CALIFORNIA JUDGES BENCHGUIDES

Benchguide 3

COURTROOM CONTROL: CONTEMPT AND SANCTIONS

[REVISED 2006]

ADMINISTRATIVE OFFICE OF THE COURTS

EDUCATION DIVISION/CENTER FOR JUDICIAL EDUCATION AND RESEARCH

ABOUT CJER

The California Center for Judicial Education and Research (CJER), as the Education Division of the Administrative Office of the Courts (AOC), is responsible for developing and maintaining a comprehensive and quality educational program for the California judicial branch. Formed in 1973 as a joint enterprise of the Judicial Council and the California Judges Association, CJER supports the Chief Justice, the Judicial Council, and the courts by providing an extensive statewide educational program for judicial officers and court staff at both the trial and appellate levels. It includes orientation programs for new judicial officers, court clerks, and administrative officers; continuing education programs for judicial officers, court administrators, and managers; an annual statewide conference for judicial officers and court administrators; video and audiotapes; and judicial benchbooks, benchguides, and practice aids.

Editorial comments and inquiries: Bob Schindewolf, Managing Attorney 415-865-7798
fax 415-865-4335

Published 2006; covers case law through 36 C4th, 131 CA4th, and all legislation to 1/1/2006

COURTROOM CONTROL: CONTEMPT AND SANCTIONS

I. SCOPE AND USE OF BENCHGUIDE

A. [§3.1] Scope of Benchguide

This benchguide provides a procedural overview of the judicial power to exercise courtroom control through the use of civil contempt proceedings under CCP §§1209–1222. It also provides a procedural overview of the judicial power to impose monetary sanctions (1) under CCP §§128.5, 128.7, 177.5, and 473(c); (2) in family law proceedings under Fam C §§271 and 3027.1, and other provisions of the Family Code; and (3) under various sanctions provisions applicable in specific instances, including "fast-track" sanctions and sanctions under Cal Rules of Ct 227.

For a detailed substantive discussion of sanctions, see CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—BEFORE TRIAL §§17.2–17.79 (Cal CJER 1995). For a detailed substantive discussion of contempt, including criminal contempt under Pen C §166, which is discussed in this benchguide in §3.24, see CIVIL PROCEEDINGS §§17.80–17.121.

Sanctions imposed under discovery statutes are not generally included in this benchguide. For a discussion of those sanctions, see CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—DISCOVERY, chap 6 (Cal CJER 1994). On the judge's authority to enforce a judgment under the court's contempt power, see CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—AFTER TRIAL §§6.165–6.166 (Cal CJER 1998).

B. [§3.2] How To Use Benchguide

The material in §§3.3–3.19 is designed to provide quick access to the procedures for handling various contempt and monetary sanctions issues. The following is a suggested approach for using this benchguide to address conduct that may warrant a finding of contempt and/or imposition of sanctions:

(1) Is the conduct contemptuous? See §§3.3–3.4.

(2) Which contempt procedure should be followed? For discussion of contempt and the shield law, see discussion in §3.5. Classify the conduct as direct, indirect, or hybrid contempt by consulting §3.6. Follow the appropriate procedural checklist in §3.7 (direct contempt), §3.8 (indirect contempt), or §3.9 (hybrid contempt). For discussion of the applicable law, refer to §§3.20–3.50, which are cross-referenced in the checklists.

(3) Use the appropriate contempt forms in §§3.108–3.111.

(4) Should sanctions be imposed? Consider using sanctions as an alternative, or in addition, to contempt. For examples of conduct that may warrant sanctions under CCP §128.5 in cases filed before 1995, see §§3.10–3.11. Follow the sanctions procedure set out in the checklist in §3.12. For discussion of the applicable law, refer to §§3.52–3.72. For sanctions under CCP §128.7 in cases filed on or after January 1, 1995, follow the sanctions procedure set out in the checklist in §3.13. For discussion of the applicable law, refer to §§3.73–3.80. For sanctions under CCP §177.5 for violation of a lawful court order, follow the sanctions procedure set out in the checklist in §3.14. For discussion of the applicable law, refer to §§3.81–3.82. For fast-track sanctions, see §§3.88–3.94; for sanctions under the California Rules of Court, see §3.100; for sanctions under CCP §473(c), see §§3.101–3.106. For sanctions under the court's inherent authority, see §3.107. For checklists for imposing sanctions under other sanctions statutes, see §§3.15–3.19.

II. CONTEMPT PROCEDURE

A. Contemptuous Acts

1. [§3.3] Examples of Contemptuous Conduct

The following are examples of conduct considered to be contemptuous:

(1) *Conduct tending to disrupt a judicial proceeding.* See CCP §1209(a)(1)–(2) (disorderly, contemptuous, or insolent behavior; breach of peace; or causing a violent disturbance). This is a common ground for using the direct contempt power to control an attorney's behavior during a trial or other court proceeding. An adjudication of contempt for misconduct during trial is commonly deferred until the conclusion of the trial. At that time, due process requires notice and hearing. But if an attorney persists in misconduct in argument despite admonishment, and if

prompt punishment is imperative, the judge may find the attorney in direct contempt and treat the contempt summarily. See *McCann v Municipal Court* (1990) 221 CA3d 527, 536, 538, 270 CR 640; §3.35. See also *Boysaw v Superior Court* (2000) 23 C4th 215, 219–220, 223, 96 CR2d 531 (judge had authority to summarily find defense counsel in contempt for counsel's direct refusal to obey judge's order not to continue arguing judge's evidentiary ruling and for counsel's rude, hostile, and disrespectful response to judge in front of jury); *Hanson v Superior Court* (2001) 91 CA4th 75, 84–85, 109 CR2d 782 (statement that attorney's client had not received a fair trial was contemptuous on its face because it impugned trial judge's integrity by suggesting he had failed in his duty to guarantee a fair trial); *People v Chong* (1999) 76 CA4th 232, 245, 90 CR2d 198 (throughout trial, defense counsel challenged judge's authority in jury's presence, made disparaging comments to judge and prosecutor, and violated judge's rulings).

(2) *Disobeying a lawful court judgment, order, or process.* This is a frequent basis for an order to show cause regarding indirect contempt against a party or witness. CCP §1209(a)(5). See, *e.g.*, *In re Riordan* (2002) 26 C4th 1235, 1237, 115 CR2d 1 and *In re Grayson* (1997) 15 C4th 792, 793–794, 64 CR2d 102 (violation of court's order to file brief); *Ross v Superior Court* (1977) 19 C3d 899, 906, 141 CR 133 (violation of injunction); *Trans-Action Commercial Investors, Ltd. v Firmaterr, Inc.* (1997) 60 CA4th 352, 371–372, 70 CR2d 449 (attorney's repeated attempts to bring matters before jury that court had ruled were inadmissible).

(3) *Acts involving the court process or a court proceeding:*

- Abusing the process or proceeding. CCP §1209(a)(4).
- Falsely pretending to act under a court order or process. CCP §1209(a)(4).
- Unlawfully interfering with the process or proceedings. CCP §1209(a)(8). See *Raygoza v Betteravia Farms* (1987) 193 CA3d 1592, 1596, 239 CR 188 (voluntary settlement conference before retired judge does not involve court proceeding or process); *In re Holmes* (1983) 145 CA3d 934, 936, 941–944, 193 CR 790 (person who knowingly assists another in evading service of process commits contempt under CCP §1209(a)(8)).
- Misusing discovery process. See CCP §2023.030(e); *Lossing v Superior Court* (1989) 207 CA3d 635, 638–639, 255 CR 18 (contempt proceedings to sanction discovery abuse are ancillary proceedings without sufficient independence to support cause of action for malicious prosecution). See also *In re De La Parra* (1986) 184 CA3d 139, 144–145, 228 CR 864 (although court has statutory power to enforce civil discovery by contempt, this drastic sanction should rarely be used; imposing jail sentence to enforce

civil discovery should be reserved for cases in which court's dignity is truly compromised, and no other suitable penalty is available).

(4) *Certain acts of an "inferior" tribunal, magistrate, or officer (CCP §1209(a)(11))*:

- Disobeying a lawful superior court judgment, order, or process.
- Proceeding in an action or a special proceeding contrary to law after the action or proceeding has been removed from jurisdiction.

(5) *Attorney's statements charging judicial dishonesty or misconduct:*

- Making an oral statement that the "court obviously does not want to apply the law." *In re Buckley* (1973) 10 C3d 237, 250, 110 CR 121 (contemptuous charge of judicial dishonesty); see *People v Chong*, *supra*, 76 CA4th at 235–236 (accusing judge of being intellectually dishonest).
- Making false statements in an affidavit supporting a disqualification motion, accusing the judge of misconduct. *In re Ciraolo* (1969) 70 C2d 389, 394, 74 CR 865; *Fine v Superior Court* (2002) 97 CA4th 651, 665, 119 CR2d 376.
- Making false statements in an affidavit supporting a disqualification motion that the judge's hatred and dislike were so great that he would willfully make unlawful rulings against the affiant. *Lamberson v Superior Court* (1907) 151 C 458, 463, 91 P 100.
- Making statements that the client had not received a fair trial and that it was the prosecutor's job to misrepresent the facts. *Hanson v Superior Court*, *supra*, 91 CA4th at 84.

(6) *Attorney's statements or acts impugning the court's integrity:*

- Making an oral statement to opposing counsel that "you won before you started." See *Gillen v Municipal Court* (1940) 37 CA2d 428, 429, 99 P2d 555.
- Making unsupported statements in a brief intimating that judges may be improperly influenced in deciding an appeal. *In re Philbrook* (1895) 105 C 471, 474, 38 P 884.
- Making untruthful statements in correspondence with opposing counsel, calculated to create the false impression that Supreme Court justices were unduly intimate with powerful litigants. *In re Shay* (1911) 160 C 399, 407, 117 P 442.

(7) *Attorney's absence from court without valid excuse.* This is the most common type of hybrid contempt. The following are examples (see §3.26):

- Failing to ascertain the new trial date after a continuance motion was handled by an associate. *In re Stanley* (1981) 114 CA3d 588, 592, 170 CR 755.
- Failing to appear for trial when representing a client for trial in a criminal case, requiring appointment of alternative counsel. *In re Baroldi* (1987) 189 CA3d 101, 109, 234 CR 286, disapproved on other grounds in 23 C4th 215, 221 (court avoided "hybrid" label; modified direct contempt procedure is adequate).
- Failing to appear for the resumption of a criminal trial. *Arthur v Superior Court* (1965) 62 C2d 404, 409, 42 CR 441 (attorney made no reasonable effort to prevent inevitable conflict and delay from unreasonable caseload, and left client unrepresented); *Lyons v Superior Court* (1955) 43 C2d 755, 759, 278 P2d 681 (attorney failed to appear at announced hour for resumption of trial when he had ability to return).
- Departing from the courtroom unannounced and without authority during trial. *Vaughn v Municipal Court* (1967) 252 CA2d 348, 358, 60 CR 575.
- Failing to attend the pronouncement of judgment and sentencing of a client. *Chula v Superior Court* (1962) 57 C2d 199, 203, 18 CR 507.

(8) *Attorney's failure to comply with Judicial Council rules.* Cal Rules of Ct 227; *Cantillon v Superior Court* (1957) 150 CA2d 184, 187, 309 P2d 890; see discussion in §3.100.

(9) *Attorney's advice to client to disobey court-ordered discovery*. *In re Bongfeldt* (1971) 22 CA3d 465, 476, 99 CR 428 (client and attorney held in contempt).

(10) *Attorney's "rude, obnoxious, offensive, and insulting" comments. Boysaw v Superior Court, supra,* 23 C4th at 223 ("The Court: Don't argue, Mr. Boysaw". . . "Mr. Boysaw: I am arguing"); *McCann v Municipal Court, supra,* 221 CA3d at 540–541 (remarks such as "[I will] not move on until you haul me away," "You're not my mother," and "If you're going to try to convict my client, I'm going to react" were unnecessarily challenging to court, disruptive, and contemptuous).

(11) *Deceit and concealment that mislead a judge*. *Daily v Superior Court* (1935) 4 CA2d 127, 132, 40 P2d 936 (misleading temporary judge in execution of judgment proceedings).

(12) *Unlawfully detaining a witness or party*. See CCP §1209(a)(7).

(13) *Witness's disobedience of a subpoena or refusal to be sworn or to testify.* See CCP §§1209(a)(9), 1991; Pen C §§1331–1331.5; *In re D.W.* (2004) 123 CA4th 491, 500–501, 20 CR3d 274; *In re Keller* (1975) 49 CA3d 663, 666, 123 CR 223. The party requesting the witness's attendance must present to the court a declaration (or affidavit) showing

the facts constituting the contempt and proof that the witness was properly served with a subpoena. See *Chapman v Superior Court* (1968) 261 CA2d 194, 197–198, 67 CR 842. A witness's absence from court could be handled as a hybrid contempt, while the refusal to testify would be direct contempt (see §3.111 for script). See also CCP §1219.5 (special contempt procedure for minor's refusal to testify); Cal Rules of Ct 1613(c) (authorizing contempt proceeding under CCP §1991 against witness subpoenaed to testify in judicial arbitration proceeding who fails to appear). See §3.29 for discussion of civil-coercive proceedings.

(14) *Disregarding an order excluding prospective witnesses*. See CCP §1209(a)(5); Evid C §777; *People v Duane* (1942) 21 C2d 71, 80, 130 P2d 123. The court may exclude the witness's testimony, but only if the party seeking to offer the testimony was "at fault" in causing the witness's violation of the exclusion order. See *People v Adams* (1993) 19 CA4th 412, 436, 23 CR2d 512. See also Pen C §867; *People v Young* (1985) 175 CA3d 537, 542, 221 CR 32.

(15) *Interfering with a jury*. See CCP §1209(a)(8).

(16) *Certain acts by jurors or prospective jurors:*

- Failing to respond to a jury summons. CCP §1209(a)(10).
- Communicating with a party, or any other person, regarding the merits of an action, or receiving a communication from a party or other person regarding it, without immediate disclosure to the court. See CCP §1209(a)(10).

(17) *Ministerial officer's misbehavior, willful neglect, or violation of duty*. See CCP §1209(a)(3) (term "ministerial officer" includes attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform judicial or ministerial service). The following are examples:

- An attorney was held in contempt for violating his professional obligation to the court by failing to appear for oral argument without adequate justification or failing to notify the court he would not be appearing. *In re Aguilar* (2004) 34 C4th 386, 389–390, 18 CR3d 874.
- An attorney was held in contempt for intentionally making false statements to the court. 34 C4th at 394.
- Defense counsel was held in contempt for violating the duty not to mislead the judge or jury by making false statements of fact or law, when counsel argued to the jury that it was the goal of the defense and prosecution to misrepresent the facts. *Hanson v Superior Court*, *supra*, 91 CA4th at 85.

(18) *Noncompliance with child support order*. CCP §1209.5 (proof that the order was made, filed, and served on the parent or proof that the parent was present in court when the order was made, and proof of failure

to comply with the order is prima facie evidence of contempt). See *Moss v Superior Court* (1998) 17 C4th 396, 425–426, 71 CR2d 215 (proof of ability to pay is not element of contempt based on failure to comply with child support order); *In re Ivey* (2000) 85 CA4th 793, 798–799, 102 CR2d 447 (inability to pay is affirmative defense to be raised by contemner, except when alleged contempt occurs many years after support order). A violation of a *family* support order is evidence of contempt under CCP §1209.5. *People v Dilday* (1993) 20 CA4th Supp 1, 3, 25 CR2d 386. A spousal support order is also enforceable by contempt (*Bradley v Superior Court* (1957) 48 C2d 509, 522, 310 P2d 634). See §3.50.

(19) *Improper motion for reconsideration.* Filing a motion for reconsideration that does not comply with the requirements of CCP §1008 may be punished as a contempt. CCP §1008(d) (sanctions under CCP §128.7 may also be imposed).

(20) *Violating rule limiting media coverage.* Anyone who violates Cal Rules of Ct 980(c) by photographing, recording, or broadcasting a court proceeding without prior court approval may be cited for contempt or sanctioned. Cal Rules of Ct 980(f). Any unauthorized film or tape that the offender has made of the court proceedings may be confiscated. See *Marin Indep. Journal v Municipal Court* (1993) 12 CA4th 1712, 1721, 16 CR2d 550. Anyone who obtains an order permitting electronic coverage and then violates that order may be cited for contempt or sanctioned. Cal Rules of Ct 980(f). Some courts further penalize the offender by denying any Rule 980 applications that the offender may submit for a period of time, the length of which depends on the seriousness of the violation.

2. [§3.4] Examples of Acts That Are Not Contemptuous

(1) *Attorney's appropriate objection or advocacy:*

- Disregarding a court's order to sit down or keep quiet when the attorney has not been afforded an opportunity for appropriate objection or other indicated advocacy. *Cooper v Superior Court* (1961) 55 C2d 291, 297, 10 CR 842 (court's order was not "lawful" under circumstances).
- Standing while cross-examining a witness. *Curran v Superior Court* (1925) 72 CA 258, 265, 236 P 975.
- Acting in good faith to protect a client's interest. See *Gallagher v Municipal Court* (1948) 31 C2d 784, 796, 192 P2d 905; *McMillan v Superior Court* (1979) 96 CA3d 608, 611–612, 158 CR 17 (defense attorney's request for brief continuance at conclusion of prosecution's case to discuss case further with defendant before putting defendant on stand; attorney's request was reasonable, and he was not insolent or disrespectful); *Chula v Superior Court* (1952) 109 CA2d 24, 40, 240 P2d 398 (honest mistake in

interpreting law; attorney's views were presented to court in proper and respectful manner).

- Making proper objection to the court's remarks against using the word "guess." *Curran v Superior Court, supra,* 72 CA at 262 (attorney's language was inoffensive, brief, and direct).

(2) *Properly requesting disqualification of judge.* *Woolley v Superior Court* (1937) 19 CA2d 611, 628, 66 P2d 680 (affidavit did not show bad faith, and manner of its presentation was unobjectionable).

(3) *Attorney's inappropriate remarks made without contumacious (obstinately rebellious or insubordinate) intent.* An attorney may not be punished for making remarks that do not refer to judicial conduct or violate a court ruling and that are made without a specific intent to act contumaciously. *In re Carrow* (1974) 40 CA3d 924, 927, 115 CR 601 (remark that "this trial is becoming a joke" was not contemptuous on its face; deliberate mention of penalty, contrary to judge's ruling, in argument to jury was not made with specific intent to act contumaciously).

(4) *Attorney's absence from court with valid excuse.* See *Mowrer v Superior Court* (1969) 3 CA3d 223, 232, 83 CR 125, 130 (public defender required to appear in another criminal department had valid excuse for being late).

☛ JUDICIAL TIP: An attorney's absence without notice, if used as a bad-faith delaying tactic in a civil case, may warrant imposing monetary sanctions payable to the other party under the procedure provided in CCP §128.5. See *Marriage of Gumabao* (1984) 150 CA3d 572, 576, 198 CR 90. See §3.10 for examples of conduct warranting sanctions; §3.12 for CCP §128.5 procedure for awarding sanctions in civil cases.

(5) *Prospective juror's giving flippant, impertinent, or unresponsive answers in an official questionnaire designed to elicit a person's eligibility and availability for jury service.* See *Lister v Superior Court* (1979) 98 CA3d 64, 67, 159 CR 280 (questionnaire is not "order," "process," or "proceedings" of court under CCP §1209).

3. [§3.5] Contempt and Shield Law

A newsperson's refusal to disclose unpublished information (or the source of information whether published or unpublished) obtained or prepared in gathering, receiving, or processing information for communication to the public may not be considered contempt because the refusal is protected by the "shield" law. Cal Const art I, §2(b); Evid C §1070; *Delaney v Superior Court* (1990) 50 C3d 785, 796–797, 268 CR 753. This "shield" law grants newspersons virtually absolute protection against compelled disclosure. *Miller v Superior Court* (1999) 21 C4th 883, 890–891, 89 CR2d 834. A newsperson gains immunity from contempt and

the right to withhold unpublished information once he or she establishes the necessary foundation for invoking the shield law. *People v Vasco* (2005) 131 CA4th 137, 153, 31 CR3d 643; *Rancho Publications v Superior Court* (1999) 68 CA4th 1538, 1542, 1546–1547, 81 CR2d 274 (shield law may cover editorials, including paid "advertorials" under certain circumstances, but does not cover all paid advertisements).

A newsperson's immunity from contempt is not qualified such that it can be overcome by a showing of need for unpublished information within the scope of the shield law. *New York Times Co. v Superior Court* (1990) 51 C3d 453, 461, 273 CR 98. In civil cases, the shield law provides "the highest possible level of protection" from disclosure of information sought by litigants. *Playboy Enters., Inc. v Superior Court* (1984) 154 CA3d 14, 27–28, 201 CR 207.

A prosecutor's assertion of the people's right to due process of law under Cal Const art I, §29, cannot serve as a justification for holding a newsperson in contempt for refusing to surrender unpublished information. *Miller v Superior Court, supra,* 21 C4th at 892–901. But a criminal defendant's federal constitutional right to a fair trial may overcome a newsperson's claim of immunity from contempt under the shield law. *Delaney v Superior Court, supra,* 50 C3d at 793, 805, 820.

To compel a newsperson to disclose information covered by the shield law or face contempt, the defendant must make a threshold showing of a reasonable possibility that the information will materially assist in his or her defense; this showing need not be detailed or specific but must be more than mere speculation. If this threshold showing is made, the court must balance various factors, including whether the information is confidential or sensitive, what interests the shield law protects, the importance of the information to the defendant, and whether there is an alternative source for the information. *People v Ramos* (2004) 34 C4th 494, 526, 21 CR3d 575. See *Fost v Superior Court* (2000) 80 CA4th 724, 732–733, 95 CR2d 620 (if defendant makes sufficient showing, newsperson may be held in contempt of court for refusing to respond to proper cross-examination seeking information that would otherwise be protected by shield law); *In re Willon* (1996) 47 CA4th 1080, 1093, 55 CR2d 245 (judgment of contempt against newsperson who refused to disclose identity of person who provided information about pending criminal prosecution in violation of gag order was annulled; defendant did not request information that would directly assist in defense; instead, court sought disclosure to preserve its ability to control judicial process and maintain unbiased jury pool).

The shield law's protection is not contingent on a showing that a newsperson's unpublished information was obtained in confidence. *Delaney v Superior Court, supra,* 50 C3d at 805.

The shield law is not a privilege and only provides immunity from contempt. A newsperson is not entitled to seek relief until he or she has

been adjudged in contempt. 50 C3d at 797, 805–806. See *New York Times Co. v Superior Court, supra,* 51 C3d at 460 (newsperson's petition for extraordinary relief is premature until judgment of contempt has been entered); *SCI-Sacramento, Inc. v Superior Court* (1997) 54 CA4th 654, 662, 665–667, 62 CR2d 868 (newspaper did not waive rights under shield law by submitting videotape for in camera review; parties should be encouraged to allow disputed materials to be examined by court in camera because court's review may resolve matter expeditiously and short of a contempt adjudication).

To avoid confinement under a judgment of contempt that may later be set aside, a judge should stay the judgment to allow the newsperson sufficient time to seek writ relief if the judge believes there is any colorable argument the newsperson can make against the contempt adjudication. *New York Times Co. v Superior Court, supra,* 51 C3d at 460.

The shield law does not preclude statutory sanctions against a newsperson other than contempt (at least in civil actions). *Rancho Publications v Superior Court, supra,* 68 CA4th at 1543; *In re Willon, supra,* 47 CA4th at 1091. Thus, for example, monetary sanctions under CCP §1992 may be imposed against a newsperson for disobeying a subpoena to disclose unpublished information. *New York Times Co. v Superior Court, supra,* 51 C3d at 462–464 (noting limited effect of this remedy that must be sought in an independent civil action).

B. [§3.6] Classifying Civil Contempt

Classify the contempt by determining where the act was committed (see §3.26 for discussion):

- *Direct contempt* is committed in the immediate view and presence of the court or of a judge in chambers. CCP §1211(a). A common example is an attorney's disruptive conduct or statements during a court proceeding. For a procedural checklist, see §3.7. See also Rothman, California Judicial Conduct Handbook, Appendix I: Direct Contempt Checklist (CJA 1999).
- *Indirect contempt* is not committed in the immediate view and presence of the court or of a judge in chambers. See CCP §§1211–1217; *Arthur v Superior Court* (1965) 62 C2d 404, 407, 408, 42 CR 441; *Hanson v Superior Court* (2001) 91 CA4th 75, 81, 109 CR2d 782. A common example is a party's refusal to obey a court order. See CCP §1209(a)(5). For a procedural checklist, see §3.8.
- *Hybrid contempt* is committed in the court's presence, but the conduct may be excused by matters that occurred outside the courtroom. The most common example is an absent or a late attorney, who may be able to show a valid excuse. See, *e.g., Arthur v Superior Court, supra,* 62 C2d at 407; *In re Baroldi* (1987) 189

CA3d 101, 111, 234 CR 286, disapproved on other grounds in 23 C4th 215, 221. For a procedural checklist, see §3.9.

C. [§3.7] Checklist: Direct Contempt Procedure

(1) *Determine whether the direct contempt procedure is appropriate, i.e., whether the act was committed in the immediate view and presence of the court or of the judge in chambers.* CCP §1211(a). For a late or absent attorney, use the hybrid contempt procedure in §3.9. For a checklist on classifying contempt, see §3.6. For discussion, see §3.26.

(2) *Consider filing a statement of recusal if there is personal embroilment.* Consider recusal when immediate action against the contempt was not taken and the judge's involvement is personal rather than for the protection of the fair trial process. See *Hawk v Superior Court* (1974) 42 CA3d 108, 133, 116 CR 713. For discussion, see §3.36.

(3) *Determine proper judicial response to the conduct.* Analyze the offensiveness of the conduct and determine the appropriate response. Use the examples of contemptuous acts in §§3.3–3.4 to help determine whether the conduct constitutes contempt.

- *Declare a short recess to reflect in chambers about an appropriate response or to calm down if angry.* See *In re Grossman* (1972) 24 CA3d 624, 628, 101 CR 176.
- *Consider contacting county counsel for assistance.*
- *Consider whether the alleged contemner was previously warned about similar conduct.* See discussion in §3.34.
- *Consider ordering sanctions as an alternative to contempt in certain cases, using the appropriate procedure.* See §§3.10–3.19, 3.52–3.106.
- *Reflect on contemplated actions carefully before deciding to cite for contempt.* See §3.33 for discussion of the cautious exercise of direct contempt power.

☛ JUDICIAL TIP: Many judges believe that they should exercise contempt power as a last resort. Experienced judges rarely, if ever, use contempt to control their courtrooms. Rothman, California Judicial Conduct Handbook, §§4.01 et seq (CJA 1999).

(4) *Give a warning.* Warn the accused that further similar conduct will result in a contempt citation. A contempt order that is based on the tone of voice used by the alleged contemner must recite that he or she was warned the tone of voice was objectionable. *Boysaw v Superior Court* (2000) 23 C4th 215, 222–223, 96 CR2d 531. Unless the conduct is outrageous and immediately recognizable as an act of contempt, the judge must warn the person that further similar conduct will result in a citation for contempt. 23 C4th at 222. This warning must be made on the record

and must be recited in the order. 23 C4th at 222–223. For discussion, see §3.34.

(5) *Cite for contempt immediately, and make a proper record as follows:*

- *Recite that the alleged contemner was warned about the offensive conduct.* See 23 C4th at 222–223.
- *Recite in detail the act of contempt, including the actual contemptuous language used or conduct observed.* See CCP §1211(a).
- *Recite that the act occurred in the immediate view and presence of the court.* See CCP §1211(a). For discussion, see §3.26.

(6) *Adjudicate the contempt immediately if prompt punishment is imperative*. On the importance of timing of adjudication, see §3.35.

- *Give the alleged contemner an opportunity to offer any defense or mitigating circumstances, or to apologize on the record.* See §3.37.
- *Weigh the effects of an apology or other mitigating circumstances.* See §3.37.
- *Immediately determine whether the accused is guilty.* For discussion of burden of proof, see §3.25.

(7) *Impose punishment.* Determine the punishment immediately, limited as follows:

- *Impose a fine not exceeding $1000 or imprisonment not exceeding five days, or both, to punish the contemner, as well as reasonable attorneys' fees and costs, if appropriate (see CCP §1218(a); §3.28 for discussion); or*
- *Coerce compliance with an order by imprisoning the contemner until performance of an act he or she has the power to perform.* See CCP §1219(a). The "coercive" imprisonment must end when the contemner no longer has the power to comply. For discussion, see §3.30. For a spoken form for use in the coercive imprisonment of a witness for refusal to answer questions, see §3.111.

☛ JUDICIAL TIP: In a "coercion" situation, some judges set a telephone appearance at a later time so that the contemner may communicate a possible change of mind. Other judges require the contemner to be transported to court periodically for a face-to-face meeting to determine if he or she has had a change of heart regarding compliance with the court's order.

(8) *Consider staying execution of the sentence until the end of the trial or pending appellate review.* Practical considerations almost always favor granting a stay, and a stay is required for attorneys and certain others

in most situations. See CCP §§128(b), 1209(c). For discussion, see §§3.38–3.39.

(9) *Enter judgment immediately.* Promptly prepare and enter a written order as follows (see CCP §1211(a)):

- *Describe the facts as occurring in the court's immediate view and presence.*
- *Indicate whether a warning was given.*
- *State the effect of any mitigating circumstances or apology.*
- *Adjudge the accused guilty of contempt.* For discussion of burden of proof, see §3.25.
- *Prescribe the punishment and stay execution.* For discussion of judgment requirements, see §§3.40–3.42. For a sample form, see §3.110.

☛ JUDICIAL TIP: The contempt order should be prepared very carefully by, or under the direction of, the court. Once the order is final and conclusive, it cannot be amended for any reason, and an appellate court cannot remand and reinstitute contempt proceedings if the order is declared void because of a defect. In such an instance, the contemner must be released. See *In re Baroldi* (1987) 189 CA3d 101, 111, 234 CR 286, disapproved on other grounds in 23 C4th 215, 221; *Bloom v Superior Court* (1986) 185 CA3d 409, 412, 229 CR 747. Another reason to carefully prepare the order is that the failure to prepare a complete written order may be a basis for judicial discipline. See Rothman, California Judicial Conduct Handbook §4.39. Although it may not be practical for the court to prepare a written contempt order the instant it orally pronounces its finding, the court must prepare a written order "expeditiously." *In re Easterbrook* (1988) 200 CA3d 1541, 1544, 244 CR 652.

- *Report final contempt order to the State Bar, as appropriate.* See §3.42.

D. [§3.8] Checklist: Indirect Contempt Procedure

(1) *Consider preliminary determinations:*

- *Are there grounds for disqualification under CCP §§170–170.6 and* Briggs v Superior Court *(1931) 211 C 619, 629, 297 P 3?* For discussion, see CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—BEFORE TRIAL, chap 7 (Cal CJER 1995); California Judges Benchguide 2: *Disqualification of Judge* (Cal CJER).

- *Are sanctions an appropriate alternative?* Consider ordering sanctions as an alternative to contempt in certain cases. See §§3.10–3.19, 3.52–3.107.

(2) *Determine whether the indirect contempt procedure is appropriate.* The judge should determine whether the act was committed outside the court's or judge's presence, such as disobedience of a lawful court order. See CCP §§1209(a)(5), 1211(a). For a late or absent attorney, use the hybrid contempt procedure (a modified form of direct contempt) discussed in §3.9. For classifying contempt, see §3.6; for discussion, see §3.26.

(3) *Determine whether the proceeding has been properly initiated.* An attorney, a party, a judicial officer, or other person initiates an indirect contempt proceeding by filing an affidavit, declaration, or statement of facts of the contempt. CCP §1211(a); *Moss v Superior Court* (1998) 17 C4th 396, 401 n1, 71 CR2d 215. See discussion in §§3.43–3.45. Filing of the Judicial Council form Order to Show Cause and Affidavit for Contempt (FL-410) constitutes compliance with the requirement of CCP §1211(a). CCP §1211(b). For a sample form of a statement of facts by a commissioner or referee, see §3.109

(4) *Issue an order to show cause.* The court issues an order to show cause on receiving the affidavit, declaration, or statement of facts (see §3.46). For a sample form of order to show cause, see §3.108

(5) *Confirm that the order to show cause has been served.* The order to show cause must be served on the alleged contemner in the same manner as a summons. See CCP §1016; for discussion, see §3.47.

(6) *Determine if a warrant of attachment or bench warrant is needed:*

- *Issue the warrant if the alleged contemner or his or her attorney fails to appear in response to the order to show cause.* See CCP §1212; *In re Morelli* (1970) 11 CA3d 819, 835, 91 CR 72. For discussion, see §3.46.
- *Endorse on the warrant a direction that the person charged may be released by posting a specified bail.* See CCP §1213.

(7) *Hold a full and fair hearing*. The hearing must satisfy due process requirements as follows (see CCP §1217; 11 CA3d at 835):

- *Advise the accused of his or her rights, which are the same as those of a defendant in a criminal case, except there is no right to jury trial unless the punishment is imprisonment for more than six months.* See §3.25.
- *Allow the accused to appear in person or by counsel only.*
- *Hear oral and documentary evidence.* See CCP §1217; for discussion, see §3.48.

- *Permit the accused to confront and cross-examine witnesses.* See CCP §1217; for discussion, see §3.48.

(8) *Adjudicate the contempt.* Find the accused's knowledge of the order, ability to comply, and willful disobedience before convicting for willful failure to comply with a court order. See §3.49.

- *Weigh the effects of an apology or other mitigating circumstances.* See §3.37.
- *Immediately determine whether the accused is guilty.* For discussion of burden of proof, see §3.25.

(9) *Impose punishment and consider a stay of execution.* Follow the instructions in items (7) and (8) of the direct contempt procedure checklist in §3.7.

(10) *Enter an order immediately*. Promptly prepare (or direct counsel to prepare) and enter a written order (see CCP §1218; discussion in §3.49; sample form in §3.110) as follows:

- *Describe the specific conduct justifying indirect contempt.* The order must recite the specific facts giving rise to the contempt. *In re De La Parra* (1986) 184 CA3d 139, 144, 228 CR 864.
- *State the effect of any mitigating circumstances or apology.*
- *Adjudge the accused guilty of contempt.* For discussion of burden of proof, see §3.25.
- *Prescribe the punishment.* The court should consider reserving or suspending punishment to permit a contemner who has the ability to comply to do so. See *Warner v Superior Court* (1954) 126 CA2d 821, 827, 273 P2d 89 (long established practice of county to fix time within which payment must be made and not to send delinquent contemner immediately to jail).
- *For contempt for willful disobedience of a court's order (see CCP §1209(a)(5)), include facts establishing the court's jurisdiction to make the disobeyed order and the contemner's knowledge of the order, ability to comply, and willful disobedience.* See *In re Cassil* (1995) 37 CA4th 1081, 1086–1088, 44 CR2d 267. The order must be in writing or entered in the court minutes; an oral order that has not been reduced to writing or entered in the minutes is insufficient to support an adjudication of contempt. *Ketscher v Superior Court* (1970) 9 CA3d 601, 604–605, 88 CR 357. The order must also be "definitive"; otherwise, it lacks the certainty required to punish in a proceeding that is regarded as criminal or quasicriminal. 9 CA3d at 603–605 (judge's order that "if either party attacks the other, I will consider this to be contempt of court and I will punish accordingly," was not definitive, but was couched in language reasonably susceptible to interpretation that judge was merely

warning parties as to what he intended to do in future if there was any trouble). For discussion, see §3.49.

- *Report final contempt order to the State Bar, as appropriate.* See §3.42.

E. [§3.9] Checklist: Hybrid Contempt Procedure

(1) *Determine whether the hybrid contempt procedure is appropriate.* The judge should determine whether the accused may rely on outside circumstances to establish an excuse. *Arthur v Superior Court* (1965) 62 C2d 404, 409, 42 CR 441; *In re Baroldi* (1987) 189 CA3d 101, 106, 234 CR 286, disapproved on other grounds in 23 C4th 215, 221 (court declined to characterize contempt as "hybrid" but approved of this modified direct contempt procedure). For discussion, see §3.26.

(2) *Consider filing a statement of recusal if there is personal embroilment.* Consider recusal when immediate action against the contempt was not taken and the judge's involvement is personal rather than for the protection of the fair trial process. See *Hawk v Superior Court* (1974) 42 CA3d 108, 133, 116 CR 713. For discussion, see §3.36.

(3) *Determine proper judicial response to the conduct.* Consider the factors specified in item (3) of the direct contempt procedure checklist in §3.7.

(4) *Cite for contempt immediately on the record.* Follow the steps in item (5) of the direct contempt checklist in §3.7.

(5) *Notify the accused of the citation.* The court's notice may consist of informing the accused orally when he or she reappears in court or issuing an order to show cause regarding the contempt. *Arthur v Superior Court, supra,* 62 C2d at 409. See CCP §1211(a). For discussion, see §§3.46–3.47; for a sample form of order to show cause, see §3.108.

(6) *Adjudicate the contempt.* When the accused appears in response to the court's notice, adjudicate the contempt as follows:

- *Confront the accused with the charge and give a reasonable opportunity to present a valid excuse for the conduct, including adequate time to procure witnesses in defense.* See *Inniss v Municipal Court* (1965) 62 C2d 487, 490, 42 CR 594 (opportunity denied; contempt order annulled); *In re Baroldi, supra,* 189 CA3d at 106, 111, disapproved on other grounds in 23 C4th 215, 221 (contempt not characterized as hybrid, but appellate court applied comparable criteria in declaring contempt order void).
- *Continue the matter if a delay is necessary to allow the accused a reasonable opportunity to gather evidence and procure witnesses to establish an excuse. Arthur v Superior Court, supra,* 62 C2d at 409.

- *Consider whether the accused has presented a legitimate excuse for the contempt.* For discussion, see §3.37.
- *Immediately determine whether the accused is guilty.* For discussion of burden of proof, see §3.25.

(7) *Impose punishment, consider a stay of execution, and prepare a written order*:

- *Follow steps (7) to (9) of the direct contempt procedure checklist in* §3.7.
- *Recite in the order that the contemner was afforded a reasonable opportunity to be heard regarding the reasons for his or her act, and either no excuse was offered or the court found the offered excuse to be insufficient.* See *Inniss v Municipal Court, supra*, 62 C2d at 490; for a sample form, see §3.110.
- *Report final contempt order to the State Bar, as appropriate.* See §3.42.

III. SANCTIONS PROCEDURE

A. Monetary Sanctions in Civil Cases Under CCP §128.5

1. [§3.10] Examples of Conduct Warranting Sanctions

Note: Before imposing *any* sanctions, the court should determine that the requirements of procedural due process have been satisfied. See *Boyle v City of Redondo Beach* (1999) 70 CA4th 1109, 1120, 83 CR2d 164. The federal and state constitutions mandate *adequate notice* and an *opportunity to be heard* before *any* sanctions are imposed. US Const amend XIV, §1; Cal Const art I, §7(a); *Sole Energy Co. v Hodges* (2005) 128 CA4th 199, 208, 26 CR3d 823; *Levy v Blum* (2001) 92 CA4th 625, 635, 112 CR2d 144. What constitutes adequate notice and a sufficient opportunity to be heard depends on the circumstances of each case.

To be entitled to sanctions under CCP §128.5, the moving party must show that the action or tactic was in bad faith *and* frivolous or brought solely to cause unnecessary delay. *Harris v Rudin, Richman & Appel* (2002) 95 CA4th 1332, 1343, 116 CR2d 552; *Shelton v Rancho Mortgage & Inv. Corp.* (2002) 94 CA4th 1337, 1346, 115 CR2d 82. Examples of conduct warranting sanctions include:

(1) *Filing and serving a frivolous complaint*:

- Filing an amended complaint with only superficial amendments after a judge had sustained demurrers to several prior complaints. *Wilhelm v Pray, Price, Williams & Russell* (1986) 186 CA3d 1324, 1334, 231 CR 355 (lack of good faith by counsel).

- Bringing an action that lacks legal grounds. *Finnie v Town of Tiburon* (1988) 199 CA3d 1, 12, 244 CR 581 (action challenging ballot measure lacked legal grounds because evidence failed to substantiate tainted election).
- Naming clearly uninvolved defendants in an action. *Pyne v Meese* (1985) 172 CA3d 392, 405, 218 CR 87 (inclusion of unconnected or immune defendants in 42 USC §1983 action was so contrary to established law that it could only be characterized as frivolous and in bad faith).
- Filing Political Reform Act of 1974 (Govt C §§81000 et seq.) charges without merit. *Bach v McNelis* (1989) 207 CA3d 852, 876, 255 CR 232 (charges objectively without merit were filed solely to harass justice court judge).
- Including frivolous with valid causes of action. 207 CA3d at 875.
- Filing an action under the California Fair Employment and Housing Act (FEHA) (Govt C §12900) before exhausting administrative remedies. *Hon v Marshall* (1997) 53 CA4th 470, 478–479, 62 CR2d 11.

(2) *Knowingly filing false and frivolous motions:*

- Filing a motion for relief that has been provided voluntarily. *Lavine v Hospital of the Good Samaritan* (1985) 169 CA3d 1019, 1027, 215 CR 708.
- Renewing a previously denied motion without new grounds. *Fegles v Kraft* (1985) 168 CA3d 812, 814, 214 CR 380 (renewal of denied change of venue motion; lack of good faith evidenced by failure to comply with CCP §1008(b) requirements for subsequent application).
- Filing a motion for reconsideration that does not comply with the requirements of CCP §1008. This may also be punished by contempt. See *Appl v Lee Swett Livestock Co.* (1987) 192 CA3d 466, 475, 237 CR 433 (upholding award of monetary sanctions for making bad-faith and frivolous motion for reconsideration of ruling on demurrer). See also *Le Francois v Goel* (2005) 35 C4th 1094, 1097, 1107–1108, 29 CR3d 249 (party must comply with CCP §1008 by showing new or different facts, circumstances, or law, and satisfactory explanation for not bringing these matters to judge's attention at time of original motion).
- Filing a motion that merely repeats a claim the judge previously rejected in granting the opposing party's summary judgment motion. *Harris v Rudin, Richman & Appel, supra,* 95 CA4th at 1342–1344 (defendant filed motions for reconsideration to vacate

judgment and for new trial that only argued claim judge rejected in granting plaintiff summary judgment).

- Pursuing an obviously invalid default judgment. *Park Magnolia v Fields* (1987) 191 CA3d Supp 1, 5, 236 CR 900 (plaintiff's attorney's pursuit of judgment and writ of possession in unlawful detainer proceeding).
- Invalidly moving to disqualify the defendant's attorney. *Karwasky v Zachay* (1983) 146 CA3d 679, 681, 194 CR 292 (plaintiff's motion lacked support in statutes, cases, or evidence).
- Filing a motion in bad-faith violation of the parties' agreement. *M. E. Gray Co. v Gray* (1985) 163 CA3d 1025, 210 CR 285 (motion to dismiss after parties had agreed to, and court had ordered, extension of five-year statute of limitations).
- Filing a motion to tax costs of allegedly unnecessary depositions. *Silver v Gold* (1989) 211 CA3d 17, 26, 259 CR 185 (party failed to prove that deposition was unnecessary).
- Law firm's active support of a client's frivolous motions. *Young v Rosenthal* (1989) 212 CA3d 96, 118, 128, 260 CR 369 (client willfully failed to participate in discovery, and willfully and repeatedly violated court's orders; law firm knowingly lied to court and acquiesced in client's demands).

(3) *Forcing a pointless hearing on a demurrer. Ellis v Roshei Corp.* (1983) 143 CA3d 642, 649, 192 CR 57 (attorney's refusal to stipulate on sole issue raised by demurrer, purportedly because of client's suspicions of opponent, resulted in unnecessary hearing).

(4) *Failing to give notice of inability to appear in court:*

- Attorney's failure to notify opposing counsel and adequately arrange for substitute counsel. *Wong v Davidian* (1988) 206 CA3d 264, 272, 253 CR 675.
- Attorney's failure to notify opposing counsel and court of, and give reasons for, inability to appear. *Marriage of Gumabao* (1984) 150 CA3d 572, 577, 198 CR 90 (conduct was properly construed as delaying tactic).
- Person's failure to appear for postjudgment examination after being ordered to do so. See *Marriage of Adams* (1997) 52 CA4th 911, 914–916, 60 CR2d 811; *Eby v Chaskin* (1996) 47 CA4th 1045, 1048–1049, 55 CR2d 517. Sanctions may also be imposed against the person (but not his or her attorney) under CCP §708.170(a)(2). 47 CA4th at 1049.

(5) *Falsely declaring readiness for trial. Mungo v UTA French Airlines* (1985) 166 CA3d 327, 333, 212 CR 369 (counsel declared preparedness for trial, then dismissed action six days later after

unsubpoenaed key witness could not be reached, causing opponents to incur substantial trial preparation expenses).

(6) *Failing to dismiss an action when recovery is clearly precluded. Winick Corp. v County Sanitation Dist. No. 2* (1986) 185 CA3d 1170, 1181, 230 CR 289 (plaintiff prosecuted action knowing facts and law precluded recovery, which required defendant to answer and move for summary judgment).

(7) *Intentionally violating a department's time limits to force assignment to a different judge. Marriage of Quinlan* (1989) 209 CA3d 1417, 1422, 257 CR 850 (attorney prolonged hearing beyond department's time limit after failing to file disqualification on time; however, sanctions order was reversed and remanded for new hearing because of inadequate notice).

(8) *Pursuing a nonmeritorious action despite the fact that the action was marginally meritorious at its inception. West Coast Dev. v Reed* (1992) 2 CA4th 693, 704, 3 CR2d 790 (plaintiff's claim was for breach of oral contract for lifetime guaranty for roof when written contract specified otherwise).

(9) *Repeatedly scheduling discovery motions, depositions, etc., at times that were greatly inconvenient for other party. Tenderloin Housing Clinic, Inc. v Sparks* (1992) 8 CA4th 299, 304, 10 CR2d 371 (court found that sanctioned party acted in bad faith and solely for harassment).

(10) *Refusing to participate in court-ordered mediation.* See *Foxgate Homeowners' Ass'n, Inc. v Bramalea Cal., Inc.* (2001) 26 C4th 1, 108 CR2d 642 (but judge may not consider statements made during mediation because these statements are confidential under Evid C §§1119, 1121).

2. [§3.11] Examples of Conduct Not Warranting Sanctions

(1) *Giving legal advice that is not totally without merit. Sabado v Moraga* (1987) 189 CA3d 1, 9, 234 CR 249 (advice to unrepresented deponent that she could assert marital privilege was not totally without merit or bad-faith tactic to delay deposition).

(2) *Making an arguably meritorious motion or opposition to motion:*

- Motion for protective order on initial deposition, although not compelling, was arguably meritorious. *Weisman v Bower* (1987) 193 CA3d 1231, 1239, 238 CR 756.
- Attorney followed cases that misstated or misapplied law, but there was no evidence of subjective bad faith. *Garcia v Sterling* (1985) 176 CA3d 17, 22, 221 CR 349 (although motion could not succeed on merits, it was not unreasonable to think issues were arguable).
- Defendant's opposition to a motion for an order taxing costs was clearly meritorious and not undertaken for the sole purpose of harassing plaintiff. *Lubetzky v Friedman* (1988) 199 CA3d 1350, 1358, 245 CR 589.

(3) *Refusing to settle the action.* See *Triplett v Farmers Ins. Exchange* (1994) 24 CA4th 1415, 1421–1423, 29 CR2d 741.

3. [§3.12] Checklist: Sanctions Procedure Under CCP §128.5

Note: Sanctions may be imposed under CCP §128.5 only in cases filed before 1995. Sanctions under CCP §128.7 may be imposed in cases filed on or after January 1, 1995. *Olmstead v Arthur J. Gallagher & Co.* (2004) 32 C4th 804, 807, 811, 819, 11 CR3d 298. See checklist in §3.13.

(1) *Consider a party's request or initiate on court's own motion in a civil action (CCP §128.5(c)):*

- A party may request sanctions in moving or opposing papers.
- The court may impose sanctions on its own motion, following the procedure specified below.
- The court may base its own motion on a party's oral sanctions request during a hearing.

See *Marriage of Quinlan* (1989) 209 CA3d 1417, 1422, 257 CR 850; for discussion, see §3.66. Follow the procedure in item (4) below.

(2) *Determine whether the actions or tactics arise in a case filed on or before December 31, 1994.* If the case was initiated by a complaint or petition filed on or after January 1, 1995, sanctions under CCP §128.7 apply. See the checklist in §3.13 for CCP §128.7 procedures, as well as discussion in §§3.73–3.80.

(3) *Determine whether adequate notice was given under the circumstances.* CCP §128.5(c); *Lesser v Huntington Harbor Corp.* (1985) 173 CA3d 922, 930, 219 CR 562. See *Sole Energy Co. v Hodges* (2005) 128 CA4th 199, 208, 26 CR3d 823 (sanctions order cannot be issued based on ex parte application; adequate notice before imposing sanctions is required not only by CCP §128.5, but by due process clauses of both state and federal constitutions). The judge should determine adequacy of notice to satisfy basic due process requirements on a case-by-case basis, considering the facts or circumstances surrounding the sanctions request. Consider the following factors (*Marriage of Quinlan*, *supra*; see §§3.63–3.66 for discussion):

- Substantive basis for the request, *e.g.*, is it very narrow, such as a frivolous motion, or is it broad, such as a good-faith challenge to an entire action?
- Amount of sanctions requested or expenses incurred in opposing action or tactic.
- Time needed to prepare a defense.
- Complexity and length of the case.

☛ JUDICIAL TIP: Tailor notice to the case at hand. The consistent theme in the notice decisions is that adequacy truly depends on the circumstances in each case. A simple case involving a relatively small amount of sanctions on a limited issue (*e.g.*, a motion) requires little notice. However, as the complexity, length, and expense of a case and the breadth of good-faith challenge (*e.g.*, an entire action versus a motion) increase, so does the length of adequate notice. *Lesser v Huntington Harbor Corp.*, *supra*, 173 CA3d at 932. See §3.64 for discussion.

(4) *Consider special circumstances affecting adequate notice.* When a sanctions request is included in a party's moving or opposing papers, the mandatory service time of the papers may be an additional factor relevant to adequacy. See *Ellis v Roshei Corp.* (1983) 143 CA3d 642, 647 n5, 192 CR 57 (dictum). For discussion, see §3.65.

(5) *When a party orally requests immediate sanctions based on a ground arising during a hearing, consider ordering sanctions on the court's own motion*. *Marriage of Quinlan*, *supra*, 209 CA3d at 1423.

- *Determine whether a separate hearing at a later date is necessary.* Hear the sanctions issue immediately if the substantive basis for sanctions is very narrow, the requested amount is small, the need to prepare a defense is minimal, and no request for separate hearing is made.
- *Satisfy due process by giving a "clear warning" of the anticipated grounds and an adequate opportunity for an oral response by counsel.* For discussion, see §3.66.

(6) *Conduct an evidentiary hearing to consider imposing sanctions*. CCP §128.5(c); *Lesser v Huntington Harbor Corp.*, *supra*, 173 CA3d at 934; *Lavine v Hospital of the Good Samaritan* (1985) 169 CA3d 1019, 1028, 215 CR 708 (no right to jury trial). For discussion, see §3.67.

- *Give the person against whom sanctions are sought a reasonable opportunity to be heard, including an opportunity to subpoena and produce evidence and witnesses or otherwise defend against the request.*
- *Use discretion to manage the scope of the hearing, as with motions generally.*
- *Maintain objectivity while conducting the hearing and do not predetermine that sanctions will be awarded based solely on events that have already occurred.*
- *Determine whether the conduct warrants imposing sanctions.* Consult §§3.10–3.11.

☛ JUDICIAL TIP: Adequate notice and an opportunity to be heard are inevitably intertwined in determining whether due process has

been afforded. Inadequate notice precludes a fair hearing by giving the sanctioned party insufficient time to prepare a defense. *Lesser v Huntington Harbor Corp., supra*, 173 CA3d at 930.

(7) *Determine the amount of sanctions.*

- *Award reasonable expenses, including attorneys' fees, incurred as a result of the bad-faith actions or tactics.* CCP §128.5(a).
- *Use judicial discretion and expertise to determine the amount of expenses and attorneys' fees.* Do not feel bound by a "strict accounting" requirement in determining the sanctions amount. *Dwyer v Crocker Nat'l Bank* (1987) 194 CA3d 1418, 1438, 240 CR 297.

(8) *Prepare, or direct counsel to prepare, and enter a written order.* CCP §128.5(c); *Lavine v Hospital of the Good Samaritan, supra*, 169 CA3d at 1028–1029. See discussion in §3.68.

- *Recite in detail the conduct or circumstances justifying sanctions.* Do not state mere conclusions in the words of the statute. Give a factual recital, with reasonable specificity, of the circumstances leading to the order.
- *If desired, incorporate by reference portions of a party's papers that adequately set forth the conduct, circumstances, and legal arguments providing the bases for the court's conclusions.* Direct counsel to prepare the order, if appropriate. *Young v Rosenthal* (1989) 212 CA3d 96, 124, 260 CR 369.
- *Note that a minute order may not be sufficient because CCP §128.5 appears to require a "formal written order."* See *Jansen Assocs. v Codercard, Inc.* (1990) 218 CA3d 1166, 1171, 267 CR 516. But see *Harris v Rudin, Richman & Appel* (2002) 95 CA4th 1332, 1344–1345, 116 CR2d 552 (minute order sufficiently apprised parties—and reviewing court—of reasons why sanctions were imposed).

☛ JUDICIAL TIP: Carefully review counsel's draft. When incorporating a party's papers by reference, or directing counsel to draft a sanctions order, make sure (1) the order's factual basis is sufficiently specified, and (2) the order as drafted agrees with the court's bases as stated at the hearing. Otherwise, due process requirements may not be satisfied. See *Marriage of Quinlan, supra*, 209 CA3d at 1421 (grounds recited in formal order prepared by counsel had not been asserted as basis for sanctions by either counsel or judge).

- *Attach a transcript of the hearing, if available.*

(9) *Notify the State Bar if sanctions against an attorney are $1000 or greater*. See Bus & P C §6086.7(c) (excludes discovery sanctions).

B. [§3.13] Checklist: Sanctions Procedure Under CCP §128.7

For examples of conduct that may warrant sanctions under CCP §128.7, see §3.76.

(1) *Consider a party's request for sanctions or initiate a proceeding for sanctions on the court's own motion (CCP §128.7(c)) if an attorney or party has presented a paper to the court without making reasonable inquiry before certifying that to the best of that person's knowledge, information, and belief, all of the following conditions are true* (*CCP §128.7(b)*):

- The paper is not being presented primarily for an improper purpose, such as harassment or delay;
- The legal contentions are warranted by existing law or by nonfrivolous argument for modification of existing law;
- Factual allegations are warranted by the evidence or are likely to have evidentiary support after investigation; and
- The denial of factual allegations is warranted by the evidence or is reasonably based on lack of information or belief.

See discussion in §§3.73–3.80.

Note: Sanctions must be requested in a separate motion. CCP §128.7(c)(1).

(2) *Determine whether there was adequate notice and an opportunity to withdraw or correct the challenged paper*. CCP §128.7(c). A motion for sanctions under CCP §128.7 cannot generally be *filed* until 21 days after it has been *served*. During this 21-day "safe harbor" period, the party being served has the opportunity to correct the violation, and if it does so, the sanctions motion cannot be filed or pursued. CCP §128.7(c)(1) (court may shorten or extend this 21-day period). Because CCP §1005(b) requires motions to be filed at least 16 court days before the hearing, a motion for sanctions must be served at least 43 days before it will be heard (21 days prescribed by CCP §128.7(c)(1), plus 16 court days, plus 6 intervening weekend days). This notice period may be shortened by the court. See CCP §1005(b). This 43-day period is further extended under CCP §1005(b) when the notice of motion is served by mail. *Cromwell v Cummings* (1998) 65 CA4th Supp 10, 13 n3, 76 CR2d 171. Constitutional principles of due process require the notice of motion to identify the persons against whom monetary sanctions are sought. 65 CA4th Supp at 13.

Note: The opportunity to withdraw or correct challenged papers is a safe harbor provision that permits an offending party to avoid sanctions by withdrawing or correcting the papers. A party may not bring a motion for sanctions, unless there is some action the offending party may take to withdraw the improper pleading. *Malovec v Hamrell* (1999) 70 CA4th 434, 441, 82 CR2d 712.

(3) *If imposing sanctions on the court's own motion, enter an order describing the sanctionable conduct and directing the attorneys or parties to show cause why they have not violated CCP §128.7(b), unless, within 21 days of service of the order to show cause, the challenged paper is withdrawn or corrected*. CCP §128.7(c)(2).

Note: Safe harbor limitations also apply to court-initiated sanctions, so that sanctions may not be imposed if the party has no action to take to withdraw or correct the improper pleading or paper. *Malovec v Hamrell*, *supra*, 70 CA4th at 441.

(4) *Conduct a hearing to consider imposing sanctions*. CCP §128.7(c) (court may impose sanction only after notice and an opportunity to respond).

(5) *Determine the type and amount of sanctions*. CCP §128.7(d) (court must consider whether party seeking sanctions exercised due diligence). Sanctions must be limited to that which is sufficient to deter repetition of this or comparable conduct by others. CCP §128.7(c). Sanctions may include an order to pay (CCP §128.7(d)):

- A penalty into court; and
- Some or all of the reasonable expenses and attorneys' fees incurred by the moving party as a result of the sanctionable conduct if sought on motion and warranted for purpose of deterrence.

Monetary sanctions may not be awarded:

- Against a represented party for unwarranted legal contentions (CCP §128.7(d)(1)); or
- For an award based on the court's own motion unless the court issues its order to show cause before a voluntary dismissal or settlement (CCP §128.7(d)(2)).

(6) *Prepare and enter a minute order or a written order, or provide an oral order on the record*. See CCP §128.7(e) (court must describe the sanctionable conduct and explain the basis for the imposition of sanctions; there is no requirement that the order be written or that an order denying sanctions be explained).

☛ JUDICIAL TIP: If preparing a written order, it may be advisable to attach a transcript of the hearing, if available.

(7) *Notify the State Bar if sanctions against an attorney are $1000 or greater*. See Bus & P C §6086.7(c) (excludes discovery sanctions).

C. Checklists: Other Sanctions Alternatives

1. [§3.14] Checklist: Violation of Lawful Court Order Under CCP §177.5

(1) *Consider a party's request or initiate sanction proceedings on court's own motion (CCP §177.5)*:

- In moving or opposing papers, a party may request sanctions, payable to the court, against a witness, a party, a party's attorney, or both a party and a party's attorney.
- The court may impose sanctions on its own motion, following the procedure specified below.
- Sanctions under CCP §177.5 may be ordered in both civil and criminal cases. See §3.81.

☛ JUDICIAL TIP: Consider CCP §177.5 sanctions in addition, or as an alternative, to contempt for violation of a court order. Because the indirect contempt procedure is cumbersome, it may be easier to impose sanctions under CCP §177.5 for the same conduct, following the procedure in this checklist. The judge may also consider imposing sanctions under Cal Rules of Ct 227 for violation of a Judicial Council rule. See §3.100.

(2) *Determine whether the party or court gave adequate notice and an opportunity to be heard*. Follow steps (2) to (5) in §3.12, the checklist for imposing sanctions under CCP §128.5. For discussion, see §§3.63–3.67.

(3) *Determine whether there are substantive grounds for imposing sanctions.*

- A judicial officer may impose sanctions for any violation of a lawful court order without good cause or substantial justification. CCP §177.5.
- This sanction power does not apply to advocacy of counsel before the court. CCP §177.5.

(4) *Determine the amount of sanctions*. Order reasonable money sanctions, not to exceed $1500, payable to the court. CCP §177.5.

(5) *Prepare, or direct counsel to prepare, and enter a written order.* The judge should follow the steps in item (7) in §3.12, the checklist for imposing sanctions in civil cases under CCP §128.5, which contains identical order requirements. See CCP §177.5. For discussion of a CCP §128.5 order, see §§3.68–3.71.

(6) *Notify the State Bar if sanctions against an attorney are $1000 or greater*. See Bus & P C §6086.7(c) (excludes discovery sanctions).

2. [§3.15] Checklist: Expenses Under CCP §396b(b) in Challenging Attorney's Selection of Venue

(1) *Consider a party's request or initiate sanctions on court's own motion (CCP §396b(b); for discussion, see §§3.83–3.84):*

- A party may request reasonable expenses and attorneys' fees in papers seeking or opposing an order transferring an action to the proper court.
- The court may order payment of expenses on its own noticed motion, following the procedure specified below.

(2) *Determine whether the party or court gave adequate notice and an opportunity to be heard*. Follow steps (2) to (5) in §3.12, the checklist for imposing monetary sanctions under CCP §128.5, which contains substantially the same notice and hearing requirements. For discussion, see §§3.63–3.67.

(3) *Determine whether there are substantive grounds for imposing expenses*. In its discretion, the court may order payment to the prevailing party on the motion to transfer, regardless of whether the party is entitled to recover the costs of the action. In determining whether to order expenses and fees, the court must consider the following (CCP §396b(b)):

- Was an offer to stipulate to a change of venue reasonably made and rejected, and
- Was the motion or selection of venue made in good faith given the facts and law the moving or selecting party knew or should have known?

(4) *Determine the amount of expenses and fees to be paid by the attorney (CCP §396b(b))*:

- Award reasonable expenses and attorneys' fees incurred in making or resisting the motion to transfer.
- As between a party and his or her attorney, expenses and fees are the personal liability of the attorney and not chargeable to the party.

(5) *Prepare, or direct counsel to prepare, and enter a written order.* The statute does not specify formal order requirements. Thus, a minute order may suffice or the court may wish to follow the steps in item (7) of §3.12, the checklist for imposing sanctions under CCP §128.5. For discussion of a CCP §128.5 order, see §§3.68–3.71.

(6) *Notify the State Bar if sanctions against an attorney are $1000 or greater*. See Bus & P C §6086.7(c) (excludes discovery sanctions).

3. [§3.16] Checklist: Defense Costs Under CCP §1038 in Bad-Faith Tort Claim Proceeding

(1) *Determine whether a motion by a defendant or cross-defendant is properly before the court.*

- The motion for defense costs may be made in any civil proceeding under the California Tort Claims Act (Govt C §§900–935.7) or for indemnity or contribution in any civil action. CCP §1038(a). For discussion, see §3.85.
- The motion must be made before discharge of the jury or entry of judgment (CCP §1038(c)), and costs are available only when a defendant's or cross-defendant's motion for summary judgment, judgment under CCP §631.8, directed verdict, or nonsuit in the underlying proceeding is granted. See CCP §1038(d).
- The moving party must give notice of a request for defense costs in his or her papers. See CCP §1038(a).

☛ JUDICIAL TIP: The court may not impose expenses on its own motion under CCP §1038, unlike the other monetary sanctions provisions in CCP §§128.5, 128.7, 177.5, 396b(b), and 437c(j). The defense costs motion may be made only by the defendant or cross-defendant in connection with a motion for specified dispositive relief before discharge of the jury or judgment. See CCP §1038(a), (d).

(2) *Give the parties an opportunity to be heard*. CCP §1038(a). By analogy to CCP §128.5, which contains the same provision, this probably means the ability to subpoena and produce evidence and witnesses or otherwise defend against the request. For discussion, see §3.86. For discussion of a hearing under CCP §128.5, see §3.67.

(3) *Use the following two-step process, required by CCP §1038(a), to consider the motion (see discussion in §3.85)*:

- *First, determine whether the proceeding was brought, and subsequently maintained, with reasonable cause and in the good-faith belief that there was a justifiable controversy under the facts and law*. Make this determination at the time of granting the defendant's or cross-defendant's motion for summary judgment, judgment under CCP §631.8, directed verdict, or nonsuit. See CCP §1038(a), (d); *Curtis v County of Los Angeles* (1985) 172 CA3d 1243, 1252, 218 CR 772 (word "brought" encompasses continued maintenance).
- *Second, on determining that the proceeding was not brought in good faith and with reasonable cause, decide the amount of defense costs reasonably and necessarily incurred by the defendant or cross-defendant in opposing the proceeding.*

☛ JUDICIAL TIP: The two-step process set out above is mandatory on a proper motion by defendant or cross-defendant, as outlined in item (1). The court must determine and award defense costs if it finds that the underlying proceeding was not brought in good faith or with reasonable cause. CCP §1038(a).

(4) *Prepare, or direct counsel to prepare, and enter a written order awarding the costs:*

- Award the defense costs reasonably and necessarily incurred in opposing the proceeding, in addition to the costs normally awarded to the prevailing party. CCP §1038(a).
- Defense costs include reasonable attorneys' fees, expert witness fees, the expense of services of experts, advisers, and consultants in defense of the proceeding, when reasonably and necessarily incurred in defending the proceeding. CCP §1038(b).
- The statute does not specify formal order requirements. Thus, a minute order may suffice or the court may wish to follow the steps in item (7) in §3.12, the checklist for imposing sanctions under CCP §128.5. For discussion of a CCP §128.5 order, see §§3.68–3.71.

(5) *Notify the State Bar if sanctions against an attorney are $1000 or greater.* See Bus & P C §6086.7(c) (excludes discovery sanctions).

4. [§3.17] Checklist: Expenses Under CCP §437c(j) for Bad-Faith Summary Judgment Affidavits

(1) *Consider a party's request or initiate on court's own motion (CCP §437c(j)):*

- A party may request expenses in papers seeking or opposing summary judgment or summary adjudication of issues if affidavits (or declarations under CCP §2015.5) are presented by the opposing party in bad faith or solely for purposes of delay.
- The court may order payment of expenses on its own noticed motion, following the procedure specified below.

(2) *Determine whether the party or court gave adequate notice and an opportunity to be heard.* Follow steps (2) to (5) in §3.12, the checklist for imposing monetary sanctions under CCP §128.5, which contains substantially the same notice and hearing requirements. For discussion of CCP §128.5 hearing and notice requirements, see §§3.63–3.67.

(3) *Determine whether there are substantive grounds for imposing expenses.*

- *Determine whether any of the affidavits were presented in bad faith or solely for purposes of delay.*

- *Use the guidelines for evaluating the bad-faith nature of actions or tactics under CCP §128.5.* See *Winick Corp. v County Sanitation Dist. No. 2* (1986) 185 CA3d 1170, 1176, 230 CR 289. For discussion, see §3.87. For conduct warranting and not warranting sanctions under CCP §128.5 in civil cases, see §§3.10–3.11.

(4) *Determine the amount of sanctions*. If it is determined that any of the affidavits were presented in bad faith or solely for purposes of delay, award the reasonable expenses that the filing of the affidavits caused the other party to incur. CCP §437c(j).

(5) *Prepare, or direct counsel to prepare, and enter a written order*. The statute does not specify formal order requirements. Thus, a minute order may suffice or the court may wish to follow the steps in item (7) in §3.12, the checklist for imposing sanctions under CCP §128.5. For discussion of a CCP §128.5 order, see §§3.68–3.71.

(6) *Notify the State Bar if sanctions against an attorney are $1000 or greater*. See Bus & P C §6086.7(c) (excludes discovery sanctions).

5. [§3.18] Checklist: Sanctions Under Fam C §3027.1 for False Accusation of Child Abuse or Neglect in Child Custody Proceeding

(1) *Consider a request for sanctions made by a witness, party, or attorney*. Fam C §3027.1(a). See §§3.95–3.96.

(2) *Determine whether there was adequate notice and opportunity to be heard*. Once sanctions are requested, the court must schedule a hearing on an order to show cause why the requested sanctions should not be granted. Fam C §3027.1(b).

(3) *Determine whether a knowingly false accusation of child abuse or neglect was made during a custody proceeding based on the investigation conducted under Fam C §3027 or other evidence presented.* Fam C §3027.1(a).

(4) *Determine the amount of sanctions*. The sanctions may not exceed all costs directly incurred in defending against the accusation plus reasonable attorney's fees incurred in recovering the sanctions. Fam C §3027.1(a).

(5) *Prepare, or direct counsel to prepare, and enter a written order*. The statute does not specify formal order requirements. Thus, a minute order may suffice or the court may wish to follow the steps in item (7) in §3.12, the checklist for imposing sanctions under CCP §128.5.

(6) *Notify the State Bar if sanctions against an attorney are $1000 or greater*. See Bus & P C §6086.7(c) (excludes discovery sanctions).

6. [§3.19] Checklist: Sanctions Under Fam C §271 for Frustrating Settlement of Family Law Case

(1) *Consider a request for attorneys' fees and costs in the nature of sanctions*. A request should be considered whenever a party's or attorney's uncooperative conduct has interfered with the general policy of promoting settlements. Fam C §271(a). See §§3.97–3.98.

(2) *In determining whether to award sanctions under Fam C §271, consider the following factors as they affect the parties' finances under Fam C §271(a)*:

- Demonstration of financial need for the award is unnecessary.
- The imposition of sanctions under Fam C §271 must not impose an unreasonable financial burden on the sanctioned party.
- In considering an award under Fam C §271, the court must consider all evidence concerning the parties' assets, income, and abilities.

(3) *Give adequate notice and provide an opportunity to be heard*. Fam C §271(b).

(4) *Determine the amount of sanctions*. Sanctions awarded under Fam C §271 must be payable only from the property or income of the sanctioned party or from the sanctioned party's share of the community property. Fam C §271(c).

(5) *Prepare, or direct counsel to prepare, and enter a written order*. The statute does not specify formal order requirements. Thus, a minute order may suffice or the court may wish to follow the steps in item (7) in §3.12, the checklist for imposing sanctions under CCP §128.5.

(6) *Notify the State Bar if sanctions against an attorney are $1000 or greater*. See Bus & P C §6086.7(c) (excludes discovery sanctions).

IV. APPLICABLE LAW

A. Definition and Classification of Contempt

1. [§3.20] Contempt Defined

Contempt is an act, committed in or out of the court's presence, that tends to impede, embarrass, or obstruct the court in the discharge of its duties. *In re Shortridge* (1893) 99 C 526, 532, 34 P 227. For examples of contemptuous acts, see §§3.3–3.4. Contemptuous conduct is classified as direct, indirect, or hybrid. See §3.26. Characterization of contempt as criminal, civil-coercive, or civil-punitive determines how a charge is adjudicated and what punishment is permitted.

2. [§3.21] Court's Inherent and Statutory Contempt Power

A court has inherent power to exercise reasonable control over all proceedings connected with the litigation before it. *Cooper v Superior*

Court (1961) 55 C2d 291, 301, 10 CR 842; *In re Jackson* (1985) 170 CA3d 773, 778, 216 CR 539. This inherent power includes the authority to punish offenders summarily for acts committed in the court's immediate view and presence that impede, embarrass, or obstruct the court in the discharge of its duties. *In re Terry* (1888) 128 US 289, 307, 9 S Ct 77, 32 L Ed 405. The inherent power to punish contempt "is a necessary incident to the execution of the powers conferred upon the court, and is necessary to maintain its dignity, if not its very existence." *In re Buckley* (1973) 10 C3d 237, 247, 110 CR 121 (quoting *In re Shortridge* (1893) 99 C 526, 532, 34 P 227). A court does not have inherent power, however, to conduct a criminal contempt prosecution under Pen C §166. See *In re McKinney* (1968) 70 C2d 8, 13, 73 CR 580; *People v Saffell* (1946) 74 CA2d Supp 967, 982, 168 P2d 497; discussion in §3.24.

While the power to punish for contempt exists independently of statute (*Raskin v Superior Court* (1934) 138 CA 668, 669, 33 P2d 35), the Legislature has codified this principle by granting power to every court to provide for the orderly conduct of proceedings before it. CCP §128(a)(3); Pen C §1044 (duty of judge to control all proceedings during criminal trial); *Cantillon v Superior Court* (1957) 150 CA2d 184, 187, 309 P2d 890. See also CCP §128(a)(1), (4)–(6) (listing additional statutory powers of courts); *In re Easterbrook* (1988) 200 CA3d 1541, 1543 n4, 244 CR 652 (CCP §128 applies to criminal, as well as civil, cases). "Judicial officers" are granted similar powers (CCP §177(1)–(3) (listing powers of judicial officers)) and "may punish for contempt" in the cases provided in the Code of Civil Procedure. See CCP §178; Elec C §327 ("judicial officers" means judges). Code of Civil Procedure §1209 classifies certain acts as contempt of court. See §§3.3–3.4 for examples of contemptuous acts. The provisions of CCP §§1209–1222, which govern civil contempt proceedings, are intended to implement the court's inherent power to conduct its business and enforce its lawful orders. *Bridges v Superior Court* (1939) 14 C2d 464, 474, 94 P2d 983, rev'd on other grounds in (1941) 314 US 252. Penal Code §166 enumerates acts that are punishable as criminal (misdemeanor) contempt. See §3.24.

In addition to the power to punish contempt, judicial officers have been given statutory authority to impose sanctions under specified circumstances. See CCP §§128.5, 128.7, 177.5. For procedural checklists and examples for use in ordering sanctions in addition to, or as an alternative to, contempt in certain cases, see §§3.10–3.19. For discussion of use of caution in exercising contempt powers, see §3.33.

3. Limited Authority of Commissioners and Referees

a. [§3.22] No Inherent Contempt Power

Commissioners and referees do not have inherent contempt authority or the broad statutory contempt powers possessed by judges. See CCP

§259; Govt C §72190; *Marcus v Workmen's Compensation Appeals Bd.* (1973) 35 CA3d 598, 603, 111 CR 101 (decided before enactment of Lab C §5309(c), authorizing delegation of contempt authority to workers' compensation judges). The list of statutory powers of court commissioners in CCP §259, for example, does not include contempt. Furthermore, although "a judicial officer may punish for contempt in the cases provided in" the Code of Civil Procedure (CCP §178), the term "judicial officer" does not include a commissioner (see Elec C §327), and the code's general contempt provisions limit the power to a judge or court. See CCP §§1209–1222. Therefore, absent a specific statutory authorization or the parties' agreement, a commissioner or referee may not exercise contempt power. See 35 CA3d at 603.

Limitations on the contempt authority of commissioners and referees have been expressly recognized in some statutes. For example, when a referee conducts examination proceedings under CCP §708.140 to aid in the enforcement of a money judgment, "only the court that ordered the reference has power . . . to [p]unish for contempt for disobeying an order of the referee." CCP §708.140(a)(1). The referee may cite a person for contempt in the proceeding, but the judge who ordered the reference (or another judge) must adjudicate the contempt using the procedure for an indirect contempt proceeding. See CCP §1211. Disorderly, contemptuous, or insolent behavior committed in the presence of any referee, while actually engaged in any trial or hearing under court order, is punishable as criminal contempt under Pen C §166(a)(2). See *People v Kalnoki* (1992) 7 CA4th Supp 8, 12–17, 9 CR2d 827 (commissioner does not have authority to cite party for contempt under this section).

The Workers' Compensation Appeals Board has been given similar but broader authority to issue writs, summons, warrants, and all necessary process in contempt proceedings, in the same manner and to the same extent as courts of record. See Lab C §134. The board may delegate direct and hybrid contempt authority to a workers' compensation judge. See Lab C §5309(c) (specifying authority that can be delegated and defining hybrid contempt); *Runnion v WCAB* (1997) 59 CA4th 277, 286, 69 CR2d 105 (if WCAB wishes to use its substantial contempt power, it must meet standards set by CCP).

Short of exercising contempt authority, a commissioner or referee appears to have power to control proceedings before the court. This would include, for example, the authority to preserve order by requesting the bailiff to remove disruptive persons from the courtroom. See CCP §128(a).

b. [§3.23] Service as Temporary Judge Under Stipulation

The contempt authority of a commissioner, referee, or pro tem judge who serves as a temporary judge on the parties' stipulation under Cal

Const art VI, §21 depends on the situation and the terms of the stipulation. Unless the stipulation includes a specific authorization to adjudicate contempt matters, no authority to adjudicate a contempt in a separate or ancillary proceeding is granted. See *Sarracino v Superior Court* (1974) 13 C3d 1, 10, 118 CR 21 (contempt proceeding may be seen as ancillary to principal action); *In re Frye* (1983) 150 CA3d 407, 409, 197 CR 755 (absent proper stipulation, commissioner lacks authority to hear and determine contempt proceeding, and any order of contempt is void). However, because a commissioner, referee, or pro tem judge who acts under stipulation has "full judicial powers" until final determination of the case (see Cal Const art VI, §21; *In re Mark L.* (1983) 34 C3d 171, 178, 193 CR 165), he or she may adjudicate a direct contempt if the adjudication takes place before the case is finally determined and if the contemner stipulated to the commissioner, referee, or pro tem judge. *Fine v Superior Court* (2002) 97 CA4th 651, 664–665, 119 CR2d 376 (no express authority to issue contempt orders need be granted in stipulation; this authority is inherent in court's power to exercise reasonable control over its proceedings under CCP §128(a)(3)). See discussion in Rothman, California Judicial Conduct Handbook, §4.02 (CJA 1999); CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—BEFORE TRIAL §17.83 (Cal CJER 1995).

A commissioner or referee serving as a temporary judge under a stipulation that does not include contempt authority may cite a person for direct contempt for an act committed in the court's immediate view and presence or for hybrid contempt for an absence or a late court appearance. However, a judicial officer may not adjudicate an indirect contempt, such as a violation of a court order. In that situation, the judicial officer would merely file a statement of facts alleging the contempt, which would proceed to adjudication and punishment by a judge. See CCP §§1211–1217; 97 CA4th at 662–665; *Rosenstock v Municipal Court* (1976) 61 CA3d 1, 7, 132 CR 59; *Nierenberg v Superior Court* (1976) 59 CA3d 611, 615, 130 CR 847. For discussion of types of civil contempt, see §3.26. For a sample form of statement of facts, see §3.109. For an indirect contempt procedure checklist, see §3.8.

☛ JUDICIAL TIP: Some judges suggest that the stipulation to a commissioner or referee as a pro tem judge includes the express authority to adjudicate contempt.

4. Characterization as Civil or Criminal

a. [§3.24] Civil and Criminal Contempt Distinguished

Punishment for civil contempt is remedial and for the benefit of the complainant, while punishment for criminal contempt is characterized by an unconditional sentence imposed for punishment or deterrence. *Hicks v*

Feiock (1988) 485 US 624, 634, 108 S Ct 1423, 99 L Ed 2d 721. However, as noted in *In re Feiock* (1989) 215 CA3d 141, 263 CR 437, there are problems with this distinction. For example, courts do not always know at the outset of a proceeding whether to provide appropriate criminal protections to the contemner because the punishment to be pronounced is not yet known. Moreover, penalties are often greater for civil contempt than for criminal contempt, and there are fewer constitutional protections. 215 CA3d at 145 n6.

Many of the same types of conduct are listed as civil contempt in CCP §1209 and criminal contempt in Pen C §166. However, criminal contempt prosecutions under Pen C §166 do not fall within a court's inherent contempt power but are governed by rules applicable to prosecution of misdemeanors. See *In re McKinney* (1968) 70 C2d 8, 13, 73 CR 580; *People v Saffell* (1946) 74 CA2d Supp 967, 982, 168 P2d 497.

Willful disobedience of the terms of any process or order lawfully issued by any court is punishable as contempt under Pen C §166(a)(4). Punishment for contempt under this section requires a clear, intentional violation of a specific, narrowly drawn order; specificity of the order is an essential prerequisite of the contempt citation. *People v Moses* (1996) 43 CA4th 462, 468, 50 CR2d 665. See *People v Greenfield* (1982) 134 CA3d Supp 1, 4, 184 CR 604 (crime of contempt is general intent, not specific intent, crime).

A court cannot punish a violation of a condition of probation as contempt under Pen C §166(a)(4). *People v Johnson* (1993) 20 CA4th 106, 109, 24 CR2d 628. Nor can a criminal contempt of the juvenile court be punished under Pen C §166. *In re Ricardo A.* (1995) 32 CA4th 1190, 1199, 38 CR2d 586 (juvenile court contempt statute, Welf & I C §213, must be used); *In re Mary D.* (1979) 95 CA3d 34, 36–37, 156 CR 829 (Welf & I C §601 juvenile offender cannot be elevated to Welf & I C §602 juvenile criminal offender through use of contempt of court proceeding under Pen C §166(a)(4)). See *In re Francisco S.* (2000) 85 CA4th 946, 950, 958–959, 102 CR2d 514 (juvenile court cannot confine delinquent ward under its contempt power for more time than maximum confinement time permitted under offense that resulted in wardship, when contemptuous acts are violations of ward's probationary conditions).

For additional discussion of criminal contempt, see CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—BEFORE TRIAL §17.84 (Cal CJER 1995).

b. [§3.25] Criminal Nature of Civil Contempt

Civil contempt proceedings under CCP §§1209–1222, whether punitive or coercive, may arise out of either civil or criminal litigation. Furthermore, even though they are denominated civil, these proceedings are criminal in nature because of the penalties that a judge may impose.

People v Gonzalez (1996) 12 C4th 804, 816, 50 CR2d 74. The constitutional rights of the accused must be observed. See *Hicks v Feiock* (1988) 485 US 624, 632, 108 S Ct 1423, 99 L Ed 2d 721 (guilt in *criminal* contempt proceeding must be proved beyond reasonable doubt); *Mitchell v Superior Court* (1989) 49 C3d 1230, 1256, 265 CR 144 (when there are punitive sanctions, guilt must be established beyond reasonable doubt); *People v Earley* (2004) 122 CA4th 542, 550, 18 CR3d 694 (defendant is entitled to due process, including a jury trial, in postverdict adjudication of acts of contempt defendant allegedly committed during trial). But see *In re Kreitman* (1995) 40 CA4th 750, 753, 47 CR2d 595 (no right to jury trial unless punishment is imprisonment for more than six months). An alleged contemnor is entitled to the full panoply of substantive and due process rights in adjudicating even civil contempt. *People v Kalnoki* (1992) 7 CA4th Supp 8, 11, 9 CR2d 827.

A waiver of the privilege against self-incrimination requires that the accused understand the choices available, unless he or she is represented by counsel and takes the stand voluntarily. Furthermore, if indigent, the accused can request appointment of the public defender under Govt C §27706(a). See also *County of Santa Clara v Superior Court* (1992) 2 CA4th 1686, 1694, 1696, 5 CR2d 7 (indigent litigant is entitled to have appointed counsel during contempt OSC hearing and county must pay for attorney under Pen C §987.2). For further discussion of these rights, see CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—BEFORE TRIAL §17.85 (Cal CJER 1995). For discussion of double jeopardy implications, see §3.32.

5. Civil Contempt

a. [§3.26] Direct, Indirect, or Hybrid

Direct contempt is committed in the immediate view and presence of the court or of the judge in chambers, and may be punished summarily. CCP §1211(a). For procedural checklist, see §3.7. For example, failure to comply with a court order to file an opening brief in a criminal appeal after numerous extensions of time is an act occurring in the immediate view and presence of the court under CCP §1211, and willful failure to comply with this order constitutes contempt under CCP §1209(a)(5). *In re Riordan* (2002) 26 C4th 1235, 1237, 115 CR2d 1; *In re Rubin* (2001) 25 C4th 1176, 1178–1179, 108 CR2d 593; *In re Garland* (2001) 25 C4th 1172, 1174–1175, 108 CR2d 591.

The facts supporting indirect contempt arise outside the judge's or court's presence and require a more elaborate procedure to notify the person charged and to allow him or her an opportunity to be heard. See CCP §§1211–1217; *Arthur v Superior Court* (1965) 62 C2d 404, 407, 408, 42 CR 441. For procedural checklist, see §3.8.

A hybrid contempt occurs in the court's presence but may be excused by matters that occur outside the courtroom. The most common example of hybrid contempt, and the context in which the modified contempt procedure developed, is the failure of an attorney to appear in court at the scheduled time. A hybrid contempt generally proceeds as a direct contempt, because the contemptuous act (failure to appear) happened in court. The accused in a hybrid contempt proceeding, however, must be afforded notice and a reasonable opportunity to present an excuse or explain the reasons for the conduct. See *Arthur v Superior Court, supra*; *In re Baroldi* (1987) 189 CA3d 101, 106, 234 CR 286, disapproved on other grounds in 23 C4th 215, 221 (direct contempt procedure may be followed, but due process requires court to confront attorney with charge and afford reasonable opportunity to present valid excuse).

☛ JUDICIAL TIP: In a typical case, when an attorney has failed to appear in court as required, the judge gives notice of the nature of the contempt charge(s) and the time of the hearing orally when the attorney next appears in the proceedings. An alternative is to issue and serve an order to show cause regarding the contempt. See *Arthur v Superior Court, supra*, 62 C2d at 408. For a sample form of an order to show cause, see §3.108.

For statutory recognition and definition of hybrid contempt in a limited context, see Lab C §5309(c) (delegation of direct and hybrid contempt authority to workers' compensation judge). For a checklist of the hybrid contempt procedure, see §3.9.

☛ JUDICIAL TIP: The court's contempt power is separate and distinct from its power to sanction attorneys under CCP §§128.5 and 128.7 for bad-faith actions or tactics in civil cases. When conduct is not contemptuous because the accused establishes an excuse, the court may still consider ordering sanctions, such as attorneys' fees to the opposing party under CCP §128.5 or §128.7. *Marriage of Gumabao* (1984) 150 CA3d 572, 576, 198 CR 90 (attorney's failure to notify court and opposing counsel of inability to appear was properly construed as delaying tactic).

b. Punishment: Civil-Punitive or Civil-Coercive

(1) [§3.27] Characterization

Civil contempt proceedings under CCP §1209 are characterized as either punitive or coercive, depending on the type of punishment imposed.

(2) [§3.28] Punitive Proceedings

In punitive proceedings, commonly referred to as "civil-punitive," the court may impose a fine not to exceed $1000 and/or a term of

imprisonment not to exceed five days to punish a party for each separate act of contempt. See CCP §1218(a); *Fine v Superior Court* (2002) 97 CA4th 651, 674, 119 CR2d 376 (five-day sentence was appropriate punishment for attorney adjudged in contempt for filing false statement of disqualification under CCP §170.1). See also CCP §1218(b)–(c) (punishment for failure to comply with family court order). On what constitutes a separate act of contempt, see *Donovan v Superior Court* (1952) 39 C2d 848, 855, 250 P2d 246 (four distinguishable violations of injunction warranted multiple fines); *Conn v Superior Court* (1987) 196 CA3d 774, 786, 242 CR 148 (contemner's repeated failures to turn over documents as ordered constituted single act of contempt). The test is whether there were separate insults to the court's authority, several of which may occur on the same day. *Reliable Enterprises, Inc. v Superior Court* (1984) 158 CA3d 604, 621, 204 CR 786, disapproved on other grounds in 49 C3d 1230, 1248 n13 (multiple fines for separate violations of injunction occurring on different days).

The court may also order the contemner to pay the reasonable attorneys' fees and costs incurred by the opposing party because of the contempt proceeding. See CCP §1218(a); *Share v Casiano Bel-Air Homeowners Ass'n* (1989) 215 CA3d 515, 524–526, 263 CR 753 (attorneys' fee award based on parties' contract). Lastly, the court may make other appropriate orders, but may not award compensatory damages to the opposing party in the contempt proceeding. The purpose of a contempt order is not to vindicate the opposing party's rights but to preserve the dignity and authority of the court. *H. J. Heinz Co. v Superior Court* (1954) 42 C2d 164, 174–176, 266 P2d 5.

(3) [§3.29] Coercive Proceedings

In coercive proceedings, the court uses imprisonment to compel performance of some act or duty required of a person that the person has the ability, but refuses, to perform, *e.g.*, to answer a question as a witness. CCP §1219(a). But see CCP §§1219(b) (no coercive imprisonment for refusal of sexual assault victim to testify about assault), 1219(c) (victim of domestic violence may not be imprisoned for refusal to testify the first time). See also CCP §1219.5 (special contempt procedure when minor under 16 refuses to testify). The court must specify the act to be performed in the warrant of commitment. See CCP §1219(a); *Morelli v Superior Court* (1969) 1 C3d 328, 332, 82 CR 375; *H. J. Heinz Co. v Superior Court* (1954) 42 C2d 164, 174, 266 P2d 5.

☛ JUDICIAL TIP: In selecting the appropriate punishment, the court should weigh the effect of any mitigating circumstances. See §§3.37, 3.48.

(4) [§3.30] Termination of Underlying Action

Termination of the underlying action from which a contempt proceeding arises does not preclude the court from punishing contempt by imposing a fine or term of imprisonment under the limitations prescribed in CCP §1218(a) ($1000 fine and/or five days imprisonment, as well as reasonable attorneys' fees and costs). See *Bank of America v Carr* (1956) 138 CA2d 727, 734, 292 P2d 587. Indefinite coercive imprisonment under CCP §1219 for failure to perform an act must end, however, when the contemner no longer has the power to perform the act. For a witness who refuses to testify, this generally means the conclusion of the underlying proceeding. *McComb v Superior Court* (1977) 68 CA3d 89, 99, 137 CR 233. At that point, the incarceration becomes punitive and is subject to the five-day limitation in CCP §1218 for punitive confinement. See CCP §1218(a); *In re Farr* (1974) 36 CA3d 577, 584, 111 CR 649.

A witness's coercive imprisonment may continue beyond the conclusion of the underlying proceeding, however, if there are additional reasons for requiring the testimony. See 36 CA3d at 584 (coercive incarceration of reporter who violated order prohibiting prejudicial pretrial publicity releases; continued commitment to supplement record on appeal and to control court officers). In such a situation, the court must determine the point at which the commitment ceases to serve its coercive purpose and becomes punitive in character. When that point is reached, the incarceration of the contemner becomes punitive and additional confinement is limited by the five-day maximum sentence provided in CCP §1218(a).

Because a contempt proceeding is a separate and distinct action from the criminal proceeding in which the alleged contemptuous acts occurred, a bail bond issued with respect to the criminal charges does not also cover the contempt charge. *People v King Bail Bond Agency* (1990) 224 CA3d 1120, 1124–1125, 274 CR 335.

(5) [§3.31] Penalty Assessment

A penalty assessment must be levied on every fine imposed and collected by the courts for criminal offenses. Pen C §1464(a). Most judges believe that this provision does not apply to a civil contempt "fine" under CCP §1218, because contempt punished under CCP §§1209–1222 is not a criminal offense.

c. [§3.32] Double Jeopardy Considerations

The preclusion of multiple punishment in Pen C §654 applies to punishment for contempt under CCP §1218. *Mitchell v Superior Court* (1989) 49 C3d 1230, 1246, 265 CR 144; *In re Farr* (1976) 64 CA3d 605, 614, 134 CR 595. For example, a defendant who was previously held in civil contempt under CCP §1209 and given a punitive sentence of a $500

fine and five days in jail may not be prosecuted for criminal contempt under CCP §166 for the same conduct. But see *Mulvany v Superior Court* (1986) 184 CA3d 906, 908–909, 229 CR 334 (removal of order to show cause re contempt from calendar without notice to citee or his counsel does not require dismissal of contempt citation under doctrine of double jeopardy).

If the prior order of confinement for contempt was coercive in nature, rather than punitive, double jeopardy probably does not bar criminal prosecution for the conduct. See Pen C §654; *People v Derner* (1986) 182 CA3d 588, 592, 227 CR 344 (defendant's contempt conviction for failing to return custody of his daughter to his ex-wife did not prohibit subsequent felony prosecution under Pen C §278.5 based on same act, because primary purpose of contempt order was to dissuade defendant from continuing to disregard family court orders and not merely to punish him for his past violations of those orders); *People v Lombardo* (1975) 50 CA3d 849, 854, 123 CR 755 (decided under double jeopardy clause of Fifth Amendment, before amendment of Pen C §654). See also *People v Batey* (1986) 183 CA3d 1281, 1290, 228 CR 787 (contempt proceedings punished under CCP §1218, with a suspension of punishment conditioned on future compliance, did not pose double jeopardy bar to prosecution for child stealing under Pen C §278.5 arising from same conduct); *People v Moses* (1996) 43 CA4th 462, 466–471, 50 CR2d 665 (contempt is not lesser included offense of Pen C §278.5).

B. Direct Contempt Procedure

1. [§3.33] Cautious Exercise of Direct Contempt Power

A direct contempt may be punished summarily by the court. CCP §1211; *Boysaw v Superior Court* (2000) 23 C4th 215, 219–223, 96 CR2d 531. All that is required is an order reciting the facts adjudging the person guilty and prescribing the punishment. See CCP §1211; 23 C4th at 220. Because this action lacks the usual procedural safeguards and is subject to possible abuse by an arbitrary judge, direct contempt orders in particular are carefully reviewed and strictly construed by appellate courts. Therefore, a trial judge must carefully comply with all procedural requirements. *Smith v Superior Court* (1968) 68 C2d 547, 560, 68 CR 1.

The power to adjudicate direct contempt must be used prudently and with a view toward promoting the orderly administration of law rather than any form of vindication of a judge's character. *Lyons v Superior Court* (1955) 43 C2d 755, 762, 278 P2d 681, quoting *People v Turner* (1850) 1 C 152.

In *Gallagher v Municipal Court* (1948) 31 C2d 784, 794, 192 P2d 905, the California Supreme Court cautioned:

> Broadly speaking, judges are empowered to punish summarily for contempt of court in order to facilitate the orderly

> administration of justice. Disobedience of the court orders tends to lessen the effect of those orders; intemperate behavior in the course of a trial [citations] lessens the mastery of the trial judge over the progress of the proceedings and thus tends to obstruct the course of the trial. Considerable summary power, not usually available to the officers of any other branch of government, is therefore vested in judges. If that power is not wisely exercised, it can readily become an instrument of oppression. In a summary contempt proceeding the judge who metes out the punishment is usually the injured party and the prosecutor as well. Since such a situation invites caprice, appellate courts almost without exception require that the order adjudging a person in direct contempt of court recite in detail the facts constituting the alleged transgression rather than the bare conclusions of the trial judge.

In dealing with conduct that allegedly is disrespectful of the court, the judge must be "long of fuse and somewhat thick of skin." *DeGeorge v Superior Court* (1974) 40 CA3d 305, 312, 114 CR 860; see *In re Grossman* (1972) 24 CA3d 624, 628, 101 CR 176 (judge should consider in serenity of chambers whether reaction is simply judicial nerves on edge).

☛ JUDICIAL TIP: Experienced judges rarely use the contempt power to control their courtrooms. They rely instead on such techniques as strictly monitoring the decorum of the court's staff, maintaining an atmosphere of formality, enforcing adherence by all participants to clear rules of demeanor, and promptly correcting and admonishing offenders. If a court order has been violated, many judges consider imposing sanctions under CCP §177.5. Because the procedure for imposing these sanctions is less cumbersome than a contempt adjudication, and because sanctions do not carry the stigma of contempt, they are less likely to be resisted. These judges, therefore, invoke contempt only as a last resort. See Rothman, California Judicial Conduct Handbook §§4.05–4.07 (CJA 1999).

A judge is responsible for knowing or researching the proper contempt procedures. A judge's ignorance or misuse of these procedures may constitute bad faith and justify disciplinary proceedings for willful and prejudicial misconduct. See, *e.g.*, *Kloepfer v Commission on Judicial Performance* (1989) 49 C3d 826, 858, 264 CR 100 (injudicious use of contempt power was willful and prejudicial misconduct); *Ryan v Commission on Judicial Performance* (1988) 45 C3d 518, 533, 247 CR 378 (experienced judge should have known that contempt order was both substantively and procedurally invalid); *Cannon v Commission on Judicial*

Qualifications (1975) 14 C3d 678, 694, 122 CR 778 (judge never sought to establish grounds on which contempt citations were based).

2. [§3.34] Warning Requirement

A warning is required before citing an attorney for contempt based on the tone of voice used by the attorney. *Boysaw v Superior Court* (2000) 23 C4th 215, 222–223, 96 CR2d 531. No warning is required if the statement is contemptuous on its face. *In re Grossman* (1972) 24 CA3d 624, 639, 101 CR 176. Unless the conduct is outrageous and immediately recognizable as an act of contempt, the judge must warn the person that further similar conduct will result in a citation for contempt. The warning must be made on the record, and any contempt order must recite the warning that was given. *Boysaw v Superior Court*, *supra*, 23 C4th at 222–223; *In re Hallinan* (1969) 71 C2d 1179, 1181, 81 CR 1. See *People v Chong* (1999) 76 CA4th 232, 243–245, 90 CR2d 198 (judge repeatedly admonished attorney for contemptuous conduct throughout trial before citing attorney for contempt). What is required to support a finding of direct contempt in such a case is not simply that the alleged contemner used an objectionable tone of voice, but that he or she continued to do so after being admonished. *Boysaw v Superior Court*, *supra*, 23 C4th at 222.

A judge, however, may find an attorney in contempt even though the attorney has not engaged in a pattern of repeated violations before the judge. A judge has wide latitude to determine what conduct "so infects orderly judicial proceedings that contempt is permitted." Because the judge may need to act quickly "to prevent a breakdown of the proceedings," a single violation may be sufficient. *Pounders v Watson* (1997) 521 US 982, 988–990, 117 S Ct 2359, 2362–2363, 138 L Ed 2d 976 (attorney willfully asked inappropriate questions after judge admonished attorney to avoid subject).

3. When To Cite and Adjudicate

a. [§3.35] Timing

Subject to the general policy that the contempt power should be used with prudence and caution (see §3.33), contemptuous conduct should be cited and adjudicated as soon as possible. The effectiveness of a proper exercise of the contempt power may be directly related to the timeliness of the order. If the contempt proceeding is to be meaningful, it is important that inappropriate and offensive conduct be dealt with promptly when it occurs to underscore the link between the cause and its effect. *Bloom v Superior Court* (1986) 185 CA3d 409, 412, 229 CR 747; *In re Grossman* (1972) 24 CA3d 624, 628, 101 CR 176. A prompt completion of the process through judgment, with a stay of execution of the sentence, permits the contemner to seek appellate review by writ while allowing the underlying litigation to proceed without interruption. See §§3.38–3.39 for

discussion of staying execution, and §3.51 for discussion of appellate review.

Many judges, however, defer adjudication of contempt for courtroom misconduct to the conclusion of a pending trial, unless prompt punishment is imperative. See *Hanson v Superior Court* (2001) 91 CA4th 75, 81–82, 109 CR2d 782 ("summarily," as used in CCP §1211, refers to character of contempt proceeding, not its timing, and does not demand instant punishment). Due process then requires notice and an opportunity to be heard. The hearing may, and sometimes must, be set before another judge. When another judge adjudicates the contempt, the contempt is no longer direct, because it was not committed in the presence of this judge, but is now indirect and must be adjudicated using the procedures for indirect contempt. 91 CA4th at 82.

Certain types of direct contempt hearings may be postponed until after the trial has been completed if the alleged contemptuous conduct is not disrupting the trial and there is no jury to be prejudiced. See *Betsworth v Workers' Compensation Appeals Bd.* (1994) 26 CA4th 586, 597, 31 CR2d 664 (alleged contempt was personal disrespect to workers' compensation referee). If the original judge is so personally involved that his or her perspective has been affected, adjudication of contempt based on personal disrespect should be postponed and another judge obtained to hear the case. 26 CA4th at 596.

There is no statutory time limit for adjudicating contempt. The determination must be made within a reasonable time, however, or the court loses jurisdiction to act on the contempt. *In re Foote* (1888) 76 C 543, 544, 18 P 678 (jurisdiction lost because no action taken until 50 days after direct contempt occurred).

b. [§3.36] Personal Embroilment of Trial Judge

The rules on disqualification of a judge (CCP §§170–170.6), including those for self-disqualification, do not apply to direct contempt proceedings. *Blodgett v Superior Court* (1930) 210 C 1, 9, 290 P 293. However, if the contemptuous conduct is a personal attack on the judge, and the judge does not cite the contemner at the time the contempt is committed but waits until the end of the trial, procedural due process may require that the contempt be adjudicated by a different judge. Due process requires a new and impartial judge only when there is evidence that the trial judge has become so "personally embroiled" with a lawyer in the trial as to make the judge unfit to sit in judgment on the contempt charge. See *Mayberry v Pennsylvania* (1971) 400 US 455, 463, 91 S Ct 499, 27 L Ed 2d 532. It is a violation of due process for the judge to serve as judge and prosecutor when the alleged contempt did not disrupt the judicial process, but instead allegedly demonstrated personal disrespect to the judge and the

judge has become embroiled in that disrespect. *Betsworth v Workers' Compensation Appeals Bd.* (1994) 26 CA4th 586, 596, 31 CR2d 664.

Recusal because of personal embroilment in the controversy is not necessary when (1) the contempt was cited and adjudicated immediately after it occurred, and (2) the judge's involvement was not personal but was designed to protect the process of a fair trial. See *Hawk v Superior Court* (1974) 42 CA3d 108, 133, 116 CR 713; *DeGeorge v Superior Court* (1974) 40 CA3d 305, 315, 114 CR 860.

4. [§3.37] Effect of Mitigating Circumstances or Apology

In adjudicating an alleged contempt, the judge should give the contemner an opportunity to present a defense or explain mitigating circumstances. See *Hawk v Superior Court* (1974) 42 CA3d 108, 131, 116 CR 713. Even when a finding of contempt appears essential to the proper conduct of the court's business, the court should look for and carefully consider mitigating circumstances in cases of direct contempt. See *Lyons v Superior Court* (1955) 43 C2d 755, 762, 278 P2d 681 (attorney's late appearance may have been caused by illness).

The effect of an apology as a mitigating factor to the contempt lies in the sound discretion of the judge. Apologies, if sincere and not exacerbations of the affront, are generally regarded with favor by the courts. *In re Buckley* (1973) 10 C3d 237, 257, 110 CR 121; *In re Carrow* (1974) 40 CA3d 924, 933, 115 CR 601. An apology should be given serious consideration, and the judge should be inclined to accept any reasonable apology for the offender's conduct. See *Lyons v Superior Court, supra,* 43 C2d at 762.

5. Stay of Execution of Contempt Order

a. [§3.38] Mandatory Stay Provisions

Code of Civil Procedure §§128(b) and 1209(c) require a stay of execution of a contempt order affecting "an attorney, his or her agent, investigator, or any person acting under the attorney's direction, in the preparation and conduct of any action or proceeding." The execution of any sentence with respect to these persons must be stayed for three court days to enable the contemner to file a petition for extraordinary relief testing the lawfulness of the contempt order. Similar mandatory stay provisions apply to an order affecting a "public safety employee" for failure to comply with a subpoena (see CCP §§128(c), 1209(d)), a victim of sexual assault for refusal to testify concerning the assault (see CCP §128(d)), and a victim of domestic violence for refusing to testify concerning the violence (see CCP §128(e)).

The mandatory stay provisions contain an exception for a contempt order that is based on conduct proscribed by Bus & P C §6068(b) relating to an attorney's duty to maintain the respect due to courts and judicial

officers. See CCP §§128(b), 1209(c). Many judges recommend granting a stay, even though the statute does not mandate it.

b. [§3.39] Practical Considerations

Even when a stay is not mandatory, the judge should generally postpone execution of sentence if immediate jailing of the contemner is likely to interfere with any substantial rights of the litigants. A disruptive attorney should not be immediately jailed in midtrial for contempt except in extraordinary circumstances. Execution should be stayed until the trial is over. See *People v Fusaro* (1971) 18 CA3d 877, 890, 96 CR 368, disapproved on other grounds in 25 C3d 283, 292. The court should also consider staying execution of sentence when the contemner is a party or witness if immediate jailing will unreasonably interfere with the rights of any of the parties or unnecessarily delay the trial. The threat of execution of a jail term may deter further contemptuous conduct.

As a practical matter, some judges strongly urge that, except in extreme circumstances, the court should grant a short stay of execution, particularly when imprisonment is imposed, to permit review of the contempt order. They observe that because the contempt order cannot be appealed, it is unfair to order immediate imprisonment of the contemner, whose attorney must then hastily prepare a petition for writ of habeas corpus and a request for the contemner's immediate release pending the appellate court's determination of the petition. All parties, as well as the appellate courts, are better served by permitting the contemner to compile a proper record and to present authorities pertinent to the review of the contempt order.

6. Requirements of Judgment

a. [§3.40] Contents

A direct contempt order must recite the facts that occurred in the immediate view and presence of the court, adjudge that the person is guilty of contempt, and prescribe the punishment. See CCP §1211(a); *Boysaw v Superior Court* (2000) 23 C4th 215, 220, 96 CR2d 531. Compliance with CCP §1211 is a jurisdictional requirement, and an order summarily punishing a direct contempt is valid only if it recites facts with sufficient particularity to demonstrate on its face that the person's conduct constitutes a legal contempt. 23 C4th at 220, 222; *In re Buckley* (1973) 10 C3d 237, 247, 110 CR 121; *In re D.W.* (2004) 123 CA4th 491, 500–501, 20 CR3d 274; *Fine v Superior Court* (2002) 97 CA4th 651, 666, 119 CR2d 376; *In re Willon* (1996) 47 CA4th 1080, 1089, 55 CR2d 245. The order must recite all elements of the contempt. *In re Morelli* (1970) 11 CA3d 819, 851 n23, 91 CR 72. For example, a court's order finding a witness in contempt for refusing to answer specified questions was held to be insufficient; the order only generally described the witness's conduct

and did not state the underlying facts, such as the witness's invocations of privilege, the court's rulings on the claims of privilege, or the appearance and participation of counsel. *In re D.W., supra,* 123 CA4th at 500. There is no requirement, however, that the order must specifically state that the contemptuous conduct occurred "in the immediate view and presence of the court," when the facts recited in the order make that fact clear. *Boysaw v Superior Court, supra,* 23 C4th at 220–221 (order recited that defense counsel yelled at judge in front of jury in disrespectful tone of voice making it clear that cited conduct occurred in immediate view and presence of court). For discussion of burden of proof, see §3.25.

Specificity is an essential element of a contempt citation; punishment for contempt can only rest on a clear, intentional violation of a specific, narrowly drawn court order. *Board of Supervisors v Superior Court* (1995) 33 CA4th 1724, 1737, 39 CR2d 906. The contemptuous acts must be detailed with sufficient particularity so that no reference to an extrinsic document or to speculation is required. *In re Littlefield* (1993) 5 C4th 122, 138, 19 CR2d 248 (order holding attorney in contempt for failing to comply with June 20 discovery order was overturned on appeal; written judgment of contempt made no reference to June 20 order, but instead referred only to a June 17 discovery order).

If adjudication depends on volume, accent, inflection, tone of voice, manner, facial expression, or demeanor, this aspect must be described in detail. Any admonition, rebuke, or warning that was given should be recited. *Gallagher v Municipal Court* (1948) 31 C2d 784, 797, 192 P2d 905. If a warning was required because the statement made was not contemptuous on its face, or because the alleged contemptuous conduct was the attorney's objectionable tone of voice, the order must recite the warning that was given. *Boysaw v Superior Court, supra,* 23 C4th at 222–223; *In re Hallinan* (1969) 71 C2d 1179, 1181, 81 CR 1; see §3.34 for discussion of warning requirement.

When the contempt consists of the filing of a false affidavit of disqualification under CCP §170.1, due process is satisfied if the judge makes an order reciting the facts constituting the contempt, adjudging the person guilty, and prescribing the punishment. *Fine v Superior Court, supra,* 97 CA4th at 666, 673–674 (contempt order set forth sufficient facts to show that attorney's statement of disqualification contained five false allegations accusing commissioner of judicial misconduct, and also recited sufficient facts to show attorney filed statement for improper purpose of delaying proceedings after having filed several previous disqualification challenges that were without merit). A charge of judicial misconduct unsupported by facts constitutes a groundless attack on the integrity of a judicial officer and is contemptuous on its face. When faced with such an attack, the judicial officer is only required to state in the order of contempt that the charge is unsupported by fact and is false. 97 CA4th at 671.

On the punishments that may be imposed, see §§3.27–3.31.

b. [§3.41] Preparation by Trial Judge

The trial judge should personally prepare the contempt order and not delegate that duty to counsel or the clerk. The judge should take meticulous care in preparing the order to increase the likelihood that it will be upheld. *Hawk v Superior Court* (1974) 42 CA3d 108, 125 n16, 116 CR 713. It is advisable for the judge to set forth the exact words that constitute the contempt, although this is not mandatory as long as the order states the facts with sufficient particularity to show without the aid of speculation that a contempt actually occurred. See *In re Grossman* (1972) 24 CA3d 624, 633, 101 CR 176. The judge should also attach a transcript of the hearing, if available. Many judges describe in the order any mitigating circumstances or apologies, and state their effect on the severity of the punishment. See §3.37. For a sample form of order and judgment of contempt, see §3.109.

c. [§3.42] Entry and Finality

The court must sign and enter the written judgment expeditiously, particularly if imprisonment is ordered, because the contemner cannot challenge the validity of the judgment until it is entered. *In re Easterbrook* (1988) 200 CA3d 1541, 1544–1545, 244 CR 652 (untimely order set aside by reviewing court); *In re Jones* (1975) 47 CA3d 879, 881, 120 CR 914 (contempt order signed and entered eight days after contemner was jailed was deemed too late; writ of habeas corpus was issued releasing contemner from jail). The judgment must be entered in the court's permanent minutes, not just in the case file. 47 CA3d at 881.

The judgments and orders of the court in contempt cases are final and conclusive. CCP §1222. Once a judge has reduced the contempt order to writing and signed it, the contempt order cannot be amended to correct a deficiency; neither a trial court nor an appellate court may amend it for any reason. An appellate court may not remand a contempt matter to the trial court after declaring the order void, because reinstituting the proceeding is contrary to the finality requirement of CCP §1222. *In re Baroldi* (1987) 189 CA3d 101, 111, 234 CR 286, disapproved on other grounds in 23 C4th 215, 221 (court criticized finality requirement); *County of Lake v Superior Court* (1977) 67 CA3d 815, 818, 136 CR 830. Instead, the contemner must be released. See *In re Baroldi*, *supra*, 189 CA3d at 111.

A judge must notify the State Bar of any final order of contempt issued against an attorney that may involve grounds warranting discipline, *i.e.*, a willful breach of the California Rules of Professional Conduct adopted and approved under Bus & P C §§6076 and 6077. The notification to the State Bar must include a copy of the relevant court minutes, the final order, and any transcript of the contempt proceeding.

Bus & P C §6086.7(a). The judge must notify the attorney that the State Bar is being notified. Bus & P C §6086.7.

C. Indirect Contempt Procedure

1. Affidavit, Declaration, or Statement of Facts

a. [§3.43] Required To Initiate Proceeding

Indirect contempt proceedings are initiated by presenting to the court or judge an affidavit (or declaration under CCP §2015.5) of the facts constituting contempt, or a statement of the facts by a commissioner, referee, arbitrator, or other judicial officer. See CCP §1211; *Moss v Superior Court* (1998) 17 C4th 396, 401 n1, 71 CR2d 215; *In re Morelli* (1970) 11 CA3d 819, 829, 91 CR 72 (term "other judicial officer" includes reporter officiating at oral deposition). See §§3.22–3.23 for discussion of limitations on contempt power of commissioners and referees. For a sample form of statement of facts, see §3.109. The affidavit, declaration, or statement is like a complaint in a criminal case in that it frames the issues and must charge facts that show a contempt has been committed. Because indirect contempt proceedings are criminal in nature, an accused is entitled to constitutional guaranties of due process of law, including reasonably clear notice of the charges. *Reliable Enterprises, Inc. v Superior Court* (1984) 158 CA3d 604, 616, 619, 204 CR 786, disapproved on other grounds in 49 C3d 1230, 1248 n13.

Deferring the adjudication of a direct contempt to a later time before another judge changes the characterization of the contempt proceeding from direct to indirect contempt and requires that indirect contempt proceedings be used. *Hanson v Superior Court* (2001) 91 CA4th 75, 82, 109 CR2d 782.

b. [§3.44] Sufficiency and Amendment

Liberal rules governing construction and amendment of the affidavit, declaration, or statement of facts under CCP §1211.5 virtually eliminate the need to dismiss a contempt charge because of a defective pleading. The statute represents the Legislature's intent that contempt proceedings be adjudicated and reviewed on the merits and that contempt judgments not be set aside because of technical defects in the initiating affidavit. *Reliable Enterprises, Inc. v Superior Court* (1984) 158 CA3d 604, 617, 204 CR 786, disapproved on other grounds in 49 C3d 1230, 1248 n13. However, failure to file any affidavit initiating the contempt proceeding renders the contempt order void in excess of jurisdiction. *In re Cowan* (1991) 230 CA3d 1281, 1282, 1286, 281 CR 740 (affidavit requirement cannot be met solely by live testimony).

If no objection is made to the sufficiency of the affidavit, declaration, or statement of facts, the necessary elements may be established by the

facts proved at the hearing; the court must order the initiating document to be amended to conform to proof. See CCP §1211.5(a); *Reliable Enterprises, Inc. v Superior Court*, *supra*, 158 CA3d at 617 (failure of initiating affidavits to state that alleged contemner was able to comply with injunction or that any violation was willful did not result in miscarriage of justice when there was no objection to trial court's failure to amend affidavits to conform to proof as required by CCP §1211.5). The court may order or permit amendment of the affidavit for any defect or deficiency at any stage of the proceedings; the proceedings must continue as if the affidavit had been originally filed as amended, unless a reasonable postponement is necessary to enable the accused to controvert the additional facts. See CCP §1211.5(b).

A trial, order, judgment, or other proceeding is not affected by a defect or imperfection in form that does not prejudice "a substantial right of the person accused on the merits." CCP §1211.5(c). No order or judgment of conviction will be set aside, and no new trial will be granted for a pleading error, unless it has resulted in a "miscarriage of justice." See CCP §1211.5(c); *Reliable Enterprises, Inc. v Superior Court*, *supra*, 158 CA3d at 620 (due process violations resulting from failure to amend affidavit constituted miscarriage of justice requiring annulment of three contempt adjudications based on conduct occurring after acts alleged in affidavit).

c. [§3.45] Counteraffidavits or Counterdeclarations

Although not required by statute, the alleged contemner may serve and file a counteraffidavit or counterdeclaration. This paper is in the nature of an answer. *Lyon v Superior Court* (1968) 68 C2d 446, 452, 67 CR 265. The allegations in the original affidavit or declaration are deemed admitted if the accused files a counterdocument that fails to deny them; a hearing is required only on the controverted issues. *Crittenden v Superior Court* (1964) 225 CA2d 101, 107, 36 CR 903. Judges generally agree that if no counterdocument is filed, all issues are deemed controverted.

2. Order To Show Cause or Warrant of Attachment

a. [§3.46] Issuance

Code of Civil Procedure §1212 provides that the court may issue a warrant of attachment, similar to a bench warrant, to obtain jurisdiction over the alleged contemner in an indirect contempt proceeding, but this method has seldom been used except in Los Angeles County. The customary procedure in most courts is to issue an order to show cause. See CCP §1212; *Arthur v Superior Court* (1965) 62 C2d 404, 408, 42 CR 441. Ordinarily, a warrant of attachment or bench warrant is issued only when the alleged contemner, or his or her attorney, fails to appear in response to an order to show cause. See *In re Morelli* (1970) 11 CA3d 819, 847 n21,

91 CR 72; *Muller v Reagh* (1963) 215 CA2d 831, 834, 30 CR 633. An endorsement on the warrant of attachment must state that the person charged may be released on the posting of a specified bail. CCP §1213.

b. [§3.47] Service of Order To Show Cause

An order to show cause to bring a party into contempt must be served on the alleged contemner in the same manner as a summons, *i.e.*, by personal service on the contemner even if he or she is represented by counsel. See CCP §§1016–1017; *Cedars-Sinai Imaging Medical Group v Superior Court* (2000) 83 CA4th 1281, 1286–1288, 100 CR2d 320 (court does not have jurisdiction to proceed unless party charged is personally served with OSC). The order to show cause notifies the alleged contemner of the nature of the charges and the time of the hearing, and is the means for obtaining personal jurisdiction. Service of a subsequent order on the alleged contemner's attorney is appropriate when the initial order to show cause was served on the contemner in the same manner as a summons. See *In re Morelli* (1970) 11 CA3d 819, 838, 91 CR 72.

For a sample form of an order to show cause in re contempt, see §3.108.

3. Hearing, Adjudication, and Judgment

a. [§3.48] Accused's Rights at Hearing

When the alleged contemner is brought before the court or appears, the court or judge must investigate the charge and hear any answer the accused may make, and may examine witnesses for or against the accused. CCP §1217.

The accused is entitled to a full and fair hearing that satisfies due process, and is entitled to present defenses to the charge of contempt (*Farace v Superior Court* (1983) 148 CA3d 915, 917, 196 CR 297), *e.g.*, that the order is so uncertain that punishment for failure to comply with its terms would constitute a denial of due process, that the order is void or exceeds the court's jurisdiction, that the accused had no notice or knowledge of the order or is unable to comply with it. "Good faith" is not a defense to a charge of contempt, but must be considered by the court in determining the appropriate penalty. See *Conn v Superior Court* (1987) 196 CA3d 774, 788, 242 CR 148. If necessary, the court must adjourn the proceedings to afford the accused an adequate opportunity to gather evidence and prepare a defense. See CCP §1217; *In re Morelli* (1970) 11 CA3d 819, 850, 91 CR 72.

The accused's rights are essentially the same as those of a defendant in a criminal case (see *People v Gonzalez* (1996) 12 C4th 804, 816, 50 CR2d 74), except that there is no right to a jury trial unless the punishment is imprisonment for more than six months. *In re Kreitman* (1995) 40 CA4th 750, 753, 47 CR2d 595 (contemner was convicted of 42 counts of

contempt and sentenced to 210 days in jail; judgment was reversed because of court's failure to advise contemner of jury trial right). See *People v Earley* (2004) 122 CA4th 542, 550, 18 CR3d 694 (in postverdict adjudication of acts of contempt defendant allegedly committed during trial, defendant is entitled to due process, including jury trial). For additional discussion, see §3.25.

An adjudication for indirect contempt requires that the facts show the contemner's willful and contemptuous refusal to obey a valid order of the court. *In re Cassil* (1995) 37 CA4th 1081, 1087–1088, 44 CR2d 267 (accused does not have burden of proving inability to comply with order). The finding must be beyond a reasonable doubt if the proceeding results in punitive sanctions. 37 CA4th at 1086. The court must advise the accused of (1) the burden of proof, (2) his or her right to testify or in the alternative to remain silent and appear by counsel, and (3) his or her right to confront and cross-examine witnesses. See *In re Morelli, supra,* 11 CA3d at 850.

A judgment of contempt cannot be based on a void order. *Davidson v Superior Court* (1999) 70 CA4th 514, 529, 82 CR2d 739. For example, a judgment confirming a settlement is invalid and cannot support a contempt order against a party for failure to comply with the settlement, when the settlement was signed by the party's attorney but not by the party, as required by CCP §664.6. 70 CA4th at 517–518, 529–531.

The accused must appear at the hearing because of the quasi-criminal nature of a civil contempt proceeding. The appearance may be in person, by an attorney, or by affidavit or declaration. *Farace v Superior Court, supra,* 148 CA3d at 917–918. If the accused fails to appear, the court may issue a bench warrant to bring the accused before the court (CCP §1212; §3.46), continue the hearing (148 CA3d at 918), or proceed with the hearing if the court finds that the accused has been properly served and has voluntarily absented himself or herself with full knowledge of the hearing (148 CA3d at 918).

b. [§3.49] Adjudication and Judgment of Contempt

Judgments of direct and indirect contempt are prepared in generally the same manner, with two exceptions. First, a valid judgment of indirect contempt must show facts essential to establish jurisdiction for the making of the order, the defendant's knowledge of the order, his or her ability to comply, and willful disobedience. *Anderson v Superior Court* (1998) 68 CA4th 1240, 1245, 80 CR2d 891; *In re De La Parra* (1986) 184 CA3d 139, 143–144, 228 CR 864 (order that merely finds defendant in contempt of court for failure to comply with prior order is insufficient). Second, an indirect contempt judgment must state evidentiary facts supporting a finding of each of these elements, except that it need not state evidentiary facts supporting an ultimate finding of willful violation of an order, because this may be inferred from the circumstances. *Hanson v Superior*

Court (2001) 91 CA4th 75, 81, 109 CR2d 782; *Reliable Enterprises, Inc. v Superior Court* (1984) 158 CA3d 604, 614, 204 CR 786, disapproved on other grounds in 49 C3d 1230, 1248 n13.

On the punishments that may be imposed, see §§3.27–3.31. For a sample form of order and judgment of contempt, see §3.108. For discussion of a direct contempt judgment, including finality, see §§3.40–3.42.

The court may stay execution of the contempt judgment for a reasonable period to afford the contemner one last chance to comply with the order. See *Warner v Superior Court* (1954) 126 CA2d 821, 827, 273 P2d 89.

☛ JUDICIAL TIP: Many judges impose sentence, but then stay execution of the sentence to allow for a specifically described performance by a designated time. Proof of this performance must be delivered to the court at that time; otherwise, the sentence goes into effect. Such a stay may be coupled with a new order imposing monetary sanctions under CCP §177.5 for disobeying the previous order.

On reporting a final order of contempt to the State Bar, see §3.42.

D. [§3.50] Contempt for Failure To Pay Support

Judgments and orders made under the Family Code may be enforced by contempt. Fam C §290. When a court of competent jurisdiction makes a child support order, proof that the order was made, filed, and served on the parent or proof that the parent was present in court when the order was made, and proof that the parent has not complied with the order, is prima facie evidence of contempt of court. CCP §1209.5. See *Moss v Superior Court* (1998) 17 C4th 396, 401, 71 CR2d 215; *County of Monterey v Banuelos* (2000) 82 CA4th 1299, 1306–1307, 98 CR2d 710 (county that has paid support may enforce noncustodial parent's obligation to pay support by contempt in same manner as custodial parent); *People v Dilday* (1993) 20 CA4th Supp 1, 3, 25 CR2d 386 (violation of *family* support order is evidence of contempt under CCP §1209.5). A spousal support order is also enforceable by contempt (*Bradley v Superior Court* (1957) 48 C2d 509, 522, 310 P2d 634), as is an order directing one spouse to deliver specified community property to the other spouse (*Marriage of Fithian* (1977) 74 CA3d 397, 404–406, 141 CR 506). The sanction of contempt may only be imposed for violation of a court order, not for violation of the parties' agreement. *Martins v Superior Court* (1970) 12 CA3d 870, 876–877, 90 CR 898.

The alleged contemner's ability to comply with the support order is not an element of the contempt. *In re Ivey* (2000) 85 CA4th 793, 798, 102 CR2d 447. Instead, inability to pay is an affirmative defense that must be proven by the alleged contemner. 85 CA4th at 798–799, 802. Ability to

pay is an element of the contempt only when the alleged contempt occurs many years after the support order was entered. 85 CA4th at 799. A spouse who is experiencing financial difficulty in making support payments can avoid the possibility of contempt by filing an application to reduce support and demonstrating a material change in circumstances. *Marriage of Sachs* (2002) 95 CA4th 1144, 1154, 116 CR2d 273.

Contempt of a child support order may be based on a willful failure to seek and accept available employment commensurate with the alleged contemner's skills and ability. *Moss v Superior Court, supra,* 17 C4th at 401.

The court is entitled to presume a party's knowledge of the support order from the fact that the party's attorney was present in court when the order was made and was thereafter served with a copy of the order. *In re Ivey, supra,* 85 CA4th at 805 (court may reasonably infer that father's attorney informed father of order).

Each month that child, family, or spousal support has not been paid in full may be alleged as a separate count of contempt with punishment imposed for each count. CCP §1218.5(a). The statute of limitations for commencing a contempt action for failure to pay support is three years from the date the payment was due. CCP §1218.5(b). The statute of limitations for commencing a contempt proceeding to enforce any other order under the Family Code is two years from the time the alleged contempt occurred. CCP §1218.5(b). Dismissing the underlying action does not preclude the court from adjudicating a party's contempt for his or her willful failure to comply with orders made in the action before dismissal. *Moore v Superior Court* (1970) 8 CA3d 804, 810–811, 87 CR 620.

E. [§3.51] Appellate Review of Contempt Proceedings

A person held in contempt has a right to swift and meaningful appellate review of the contempt order or judgment. *Bloom v Superior Court* (1986) 185 CA3d 409, 412, 229 CR 747. Code of Civil Procedure §1222 permits this immediate review by making a judgment and order in a contempt case final and conclusive. The judgment and order are not appealable (CCP §§904.1(a)(1) (no right of appeal in unlimited civil case), 904.2(a) (no right of appeal in limited civil case); *People v Gonzalez* (1996) 12 C4th 804, 816, 50 CR2d 74; *Davidson v Superior Court* (1999) 70 CA4th 514, 522, 82 CR2d 739), but may be reviewed by filing a petition for a writ of habeas corpus if the contemner is imprisoned (see Pen C §1473(a); *In re Buckley* (1973) 10 C3d 237, 259, 110 CR 121; *Davidson v Superior Court, supra,* 70 CA4th at 522; *In re De La Parra* (1986) 184 CA3d 139, 141, 228 CR 864). A contempt adjudication may also be reviewed by filing a petition for a writ of

review. See CCP §1068; *People v Gonzalez*, *supra*, 12 C4th at 816; *Hanson v Superior Court* (2001) 91 CA4th 75, 80 n1, 109 CR2d 782 (appellate court treated habeas corpus petition as petition for writ of prohibition).

A trial court that improperly dismisses a contempt proceeding may be compelled by mandate to proceed with it. See CCP §1085; *Butler v Butler* (1967) 255 CA2d 132, 136, 62 CR 825.

The scope of review is generally confined to jurisdictional questions, and review of the evidence is limited to an inquiry into whether there is any substantial evidence of the jurisdictional facts. *In re Buckley*, *supra*, 10 C3d at 259; *In re Willon* (1996) 47 CA4th 1080, 1089, 55 CR2d 245. See, *e.g.*, *Ketscher v Superior Court* (1970) 9 CA3d 601, 604–605, 88 CR 357 (court lacked jurisdiction to find party in contempt for violation of oral order that was not reduced to writing or entered in minutes and that was not definitive).

In reviewing a civil contempt order, an appellate court does not presume the order is correct. Because of the summary nature of civil contempt proceedings, all presumptions are drawn against the validity of the contempt order. "Practically speaking, this places the burden on the court to cross all the 'i's' and dot all the 't's.'" *In re D.W.* (2004) 123 CA4th 491, 501, 20 CR3d 274 (quoted to show even the appellate courts can get their "i's" and "t's" mixed up); *People v Kalnoki* (1992) 7 CA4th Supp 8, 11, 9 CR2d 827 (judgments of contempt are strictly construed in favor of contemnor).

F. Monetary Sanctions in Civil Cases Under CCP §128.5

1. [§3.52] Court's Authority To Order

Sanctions may be imposed under CCP §128.5 only in cases filed before 1995; sanctions may be imposed under CCP §128.7 only in cases filed on or after January 1, 1995. *Olmstead v Arthur J. Gallagher & Co.* (2004) 32 C4th 804, 807, 811, 819, 11 CR3d 298. See checklist in §3.13 and discussion of law in §§3.73–3.80.

In determining which sanctions statute applies, the court considers the filing date of the action rather than the date of the subsequent filing that forms the basis for the sanctions motion. See *Orange County Dep't of Child Support Servs. v Superior Court* (2005) 129 CA4th 798, 804, 28 CR3d 877 (CCP §128.5 was applicable sanctions statute in proceeding to impose sanctions against local child support agency and its attorney for prosecuting nonmeritorious contempt proceeding against father for his alleged failure to comply with child support order entered before January 1, 1995); *Marriage of Drake* (1997) 53 CA4th 1139, 1169, 62 CR2d 466 (CCP §128.5 was applicable sanctions statute in action filed before 1995, even though sanctions motion was based on response to petition filed in April 1995).

The anti-SLAPP statute, CCP §425.16, states, somewhat anachronistically, that when the judge finds that a special motion to strike under that statute "is frivolous or is solely intended to cause unnecessary delay," the judge must award costs and reasonable attorney's fees to the prevailing plaintiff "pursuant to Section 128.5." See CCP §425.16(c); *Moore v Shaw* (2004) 116 CA4th 182, 198–199, 10 CR3d 154 (imposing sanctions for frivolous motion is mandatory). One appellate court has observed that this reference to CCP §128.5 in CCP §425.16(c) has remained unchanged since the anti-SLAPP statute was enacted in 1992. Although the reference to CCP §128.5 in CCP §425.16(c) does not resuscitate CCP §128.5, judges must continue to "use the procedure and apply the substantive standards of section 128.5 in deciding whether to award attorney fees under the anti-SLAPP statute." *Decker v U.D. Registry, Inc.* (2003) 105 CA4th 1382, 1392, 129 CR2d 892 (vacating award to plaintiff of attorney's fees because judge's order stated only that defendant's motion was frivolous; it failed to recite in detail conduct or circumstances justifying order, as required by CCP §128.5(c)). See *Morin v Rosenthal* (2004) 122 CA4th 673, 681–682, 19 CR3d 149 (to award sanctions, judge must find special motion to strike was frivolous or brought solely to delay proceedings and must follow procedural requirements for sanctions order specified by CCP §128.5).

The Supreme Court has agreed with this approach and has held that the fact that other statutes expressly refer to CCP §128.5 as the model for awarding sanctions for abusive or frivolous conduct in particular circumstances does not mean that these statutes "resuscitate" CCP §128.5 for purposes of general application to post-1994 actions and proceedings. *Olmstead v Arthur J. Gallagher & Co.*, *supra*, 32 C4th at 818 n7. See, *e.g.*, Fam C §273 (court may not award attorney's fees against any governmental agency involved in family law matter or child support proceeding except when sanctions are appropriate under CCP §128.5).

a. [§3.53] Bad Faith Actions or Tactics Must Be Shown

"Every trial court may order a party, the party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." CCP §128.5(a). See *Marriage of Gumabao* (1984) 150 CA3d 572, 577, 198 CR 90 (nonappearance was properly construed as delaying tactic).

"Actions or tactics" include, but are not limited to, (1) the making or opposing of motions, or (2) the filing and service of a complaint or cross-complaint. "Actions or tactics" do not include the mere filing of a complaint without service on an opposing party. CCP §128.5(b)(1). "Frivolous" means (1) totally and completely without merit, or (2) for the sole purpose of harassing an opposing party. CCP §128.5(b)(2).Whether

sanctions are warranted depends on an evaluation of all the circumstances surrounding the questioned action, for example:

- A judge properly imposed sanctions against a law firm that pursued litigation activities on behalf of its client, even after the firm knew that the client was a suspended corporation. See *Palm Valley Homeowners Ass'n, Inc. v Design MTC* (2000) 85 CA4th 553, 555–556, 558–563, 102 CR2d 350 (firm's willful concealment from court and opposing counsel of client's suspension for failure to file statement required by Corp C §1502 supported finding of bad faith).
- A judge should not have imposed sanctions against an attorney for conduct condemned by an ABA formal opinion, but which was not condemned by any decision, statute, or Rule of Professional Conduct applicable in this state. See *State Compensation Ins. Fund v WPS, Inc.* (1999) 70 CA4th 644, 655–656, 82 CR2d 799.
- A judge properly imposed sanctions against the plaintiff in the amount of attorney's fees incurred by an out-of-state defendant in filing a third motion to quash after the court had granted the defendant's two prior motions to quash on finding a lack of sufficient minimum contacts. See *Sabek, Inc. v Engelhard Corp.* (1998) 65 CA4th 992, 1000–1001, 76 CR2d 882.
- A judge properly imposed sanctions against the plaintiff for prosecution of a frivolous complaint against the defendant at a trial de novo following judicial arbitration in which the arbitrator found this defendant was not liable to the plaintiff. *Muega v Menocal* (1996) 50 CA4th 868, 874–875, 57 CR2d 697.
- A judge properly ordered the plaintiff to pay sanctions to the defendant based on the plaintiff's persistent bad-faith tactics consisting of twice filing and then voluntarily dismissing complaints against the defendant that should have been litigated in the defendant's action against the plaintiff. *Abandonato v Coldren* (1995) 41 CA4th 264, 267, 48 CR2d 429.

b. [§3.54] Subjective Versus Objective Bad Faith

The majority of courts have held that, in addition to a meritless or frivolous action, subjective bad faith (*i.e.*, an improper purpose) must be shown before CCP §128.5 sanctions may be imposed. See *Orange County Dep't of Child Support Servs. v Superior Court* (2005) 129 CA4th 798, 804–805, 28 CR3d 877; *Guillemin v Stein* (2002) 104 CA4th 156, 167, 128 CR2d 65; *Shelton v Rancho Mortgage & Inv. Corp.* (2002) 94 CA4th 1337, 1346, 115 CR2d 82; *Levy v Blum* (2001) 92 CA4th 625, 635, 112 CR2d 144; *Marriage of Reese & Guy* (1999) 73 CA4th 1214, 1221, 87 CR2d 339; *Campbell v Cal-Gard Surety Servs., Inc.* (1998) 62 CA4th 563,

573, 73 CR2d 64; *Dolan v Buena Eng'rs, Inc.* (1994) 24 CA4th 1500, 1506, 29 CR2d 903. Under this test, it is not enough that a litigant should have known that the report on which the litigation was based was fraudulent; there must be proof that the litigant actually knew that the report was fraudulent. *Talavera v Nevarez* (1994) 30 CA4th Supp 1, 5, 35 CR2d 402 (because there was no actual knowledge, no bad faith was demonstrated). Although a judge may infer subjective bad faith from the pursuit of a frivolous tactic, the judge has the discretion *not* to draw this inference if the judge is convinced the party was acting in the good faith belief the action was meritorious. *Shelton v Rancho Mortgage & Inv. Corp.*, *supra*, 94 CA4th at 1346–1347.

Other courts have held that an objective lack of merit (frivolousness), measured by a "reasonable attorney" standard, may by itself be a basis for imposition of sanctions under CCP §128.5. See, *e.g.*, *On v Cow Hollow Props.* (1990) 222 CA3d 1568, 1575, 272 CR 535.

When a request for sanctions is based on a party's alleged bad faith conduct occurring at a hearing before a court commissioner, that commissioner, not a judge, should determine whether to order sanctions. A judge, who was not present at the earlier hearing, cannot effectively draw a conclusion as to whether the party's conduct amounted to subjective bad faith. *Orange County Dep't of Child Support Servs. v Superior Court*, *supra*, 129 CA4th at 805–807.

c. [§3.55] Arguably Meritorious Action

Once a party shows that his or her action was arguably meritorious (under the circumstances and in light of existing standards for the particular area of law within which the action was taken), the logical conclusion is that the party's motive was probably not solely to harass or cause unnecessary delay, and that sanctions are probably not warranted. Therefore, the party moving for sanctions has the burden of proving that the arguably meritorious action was taken for improper motives. *Weisman v Bower* (1987) 193 CA3d 1231, 1236, 238 CR 756. As a practical matter, the moving party will normally assert that the action lacks legal support, and the burden will then shift to the other party to cite authority for the action. 193 CA3d at 1236 n6.

d. [§3.56] Sanctions in Favor of Dismissed Defendant

A judge retains jurisdiction to award sanctions to a defendant who has been dismissed from the action by the plaintiff. *Abandonato v Coldren* (1995) 41 CA4th 264, 266 n3, 48 CR2d 429.

e. [§3.57] Sanctions Against Defendants

Sanctions are not limited to plaintiffs. A judge may sanction a defendant for a bad-faith assertion of a frivolous and unmeritorious

defense. *Southern Christian Leadership Conf. v Al Malaikah Auditorium* (1991) 230 CA3d 207, 227–228, 281 CR 216.

f. [§3.58] Reconsideration of Request for Sanctions

Denial of a motion for sanctions at an earlier stage of the litigation does not preclude a judge from granting them at a later stage. See *Andrus v Estrada* (1995) 39 CA4th 1030, 1042–1043, 46 CR2d 300. The award of sanctions for motions to set aside a judgment and new trial that were not any different legally or factually than previous arguments and motions were supported even though the party was ultimately successful in overturning the summary judgment at the appellate level based on a new theory. *Harris v Rudin, Richman & Appel* (2002) 95 CA4th 1332, 1342–1344, 116 CR2d 552 (defendant filed motions for reconsideration, to vacate judgment, and for new trial that only repeated arguments judge had rejected in granting plaintiff summary judgment); *Bond v Pulsar Video Prods.* (1996) 50 CA4th 918, 923, 57 CR2d 917 (sanctions proper if finding that plaintiff's claim was frivolous, without foundation, and in bad faith).

Although a party's motion for reconsideration must comply with CCP §1008, a judge's ability to reconsider his or her interim rulings on the judge's own motion is not so limited. *Le Francois v Goel* (2005) 35 C4th 1094, 1097, 1103–1105, 1107–1108, 29 CR3d 249. When a judge is concerned that a prior ruling may have been erroneous and should be reconsidered, the judge should inform the parties of his or her concern, ask the parties to brief the issue, and hold a hearing. 35 C4th at 1108–1109.

g. [§3.59] Sanctions No Substitute for Malicious Prosecution Action

Sanctions under CCP §128.5 are not meant to be a substitute for a malicious prosecution action; §128.5 allows compensation for out-of-pocket litigation costs only and not consequential damages. *Crowley v Katleman* (1994) 8 C4th 666, 688–689, 34 CR2d 386. See discussion in §3.71 on the collateral estoppel effect of an order denying sanctions.

h. [§3.60] Payment of Sanctions

Sanctions ordered under CCP §128.5 are payable to the party incurring the expenses and not to the court. *Kane v Hurley* (1994) 30 CA4th 859, 862, 35 CR2d 809.

i. [§3.61] Award of Attorneys' Fees

Reasonable attorneys' fees may be awarded as a sanction in favor of a party that is represented on a contingency basis even though that party incurs no obligation to pay any attorneys' fees. *Marriage of Adams* (1997) 52 CA4th 911, 914, 60 CR2d 811. See *Lolley v Campbell* (2002) 28 C4th

367, 373–375, 121 CR2d 571 (party entitled to award of attorney's fees by statute is entitled to recover fees even if party is not obligated to pay attorney's fees out of its own assets).

There is a split of authority about whether a judge may award attorneys' fees as a sanction in favor of a nonattorney pro per litigant or a self-representing attorney litigant. One case has held that a judge may do so. See *Abandonato v Coldren* (1995) 41 CA4th 264, 269, 48 CR2d 429. See also *Laborde v Aronson* (2001) 92 CA4th 459, 467–469, 112 CR2d 119 (attorney who represents self may be awarded sanctions under CCP §128.7). A more recent case, *Argaman v Ratan* (1999) 73 CA4th 1173, 86 CR2d 917, specifically disagreed with *Abandonato* that attorneys who represent themselves may be awarded attorneys' fees as sanctions under CCP §128.5. 73 CA4th at 1180–1181. This case held that an attorney who is litigating an action in pro per may not be awarded a monetary sanction for the defendant's abuse of the discovery process that includes compensation for the plaintiff's time as an attorney because the plaintiff did not incur any expense for this time. The judge should have limited the monetary sanction to the specific costs the plaintiff incurred, in filing fees and duplication costs. 73 CA4th at 1176–1181 (followed *Trope v Katz* (1995) 11 C4th 274, 292, 45 CR2d 241, in which Supreme Court held that fees of attorneys who litigate their own claims in pro per are not recoverable under CC §1717). See *Kravitz v Superior Court* (2001) 91 CA4th 1015, 1020–1021, 111 CR2d 385 (agreeing with *Argaman* that pro se attorney cannot recover attorney's fees as discovery sanction, but that attorney can recover costs that are ordinarily included in attorneys' hourly rates or other fee structures, *e.g.*, expenses for computer-assisted legal research, photocopying, or transportation to and from court). A more recent case has held, however, that a judge may award monetary sanctions, including attorney's fees, to a party based on the opposing party's abuse of the discovery process even when the party is being represented by an attorney free of charge. *Do v Superior Court* (2003) 109 CA4th 1210, 1213–1218, 135 CR2d 855. Monetary sanctions in the form of fees may be ordered when the award does not result in disparate treatment between litigants. This is true whether a party actually incurs additional fees as a result of the opposing party's conduct. 109 CA4th at 1218.

2. [§3.62] Limitations on Court's Exercise of Sanctions Power

Judges should impose sanctions "only in the clearest of cases, to penalize the most egregious misconduct. This judicial restraint is motivated by serious concerns about the danger of hampering the valid assertion of a litigant's rights." *Weisman v Bower* (1987) 193 CA3d 1231, 1237, 238 CR 756.

A judge's authority to award sanctions under CCP §128.5 is limited to civil cases. The statute was not intended to apply in criminal cases. *People v Cook* (1989) 209 CA3d 404, 409, 257 CR 226.

A judge may order payment of sanctions only by a party, by the party's attorney, or by both to another party. A judge does not have jurisdiction to impose sanctions against an attorney of a nonparty in favor of that attorney's nonparty client. CCP §128.5(a). See *Rabbitt v Vincente* (1987) 195 CA3d 170, 175, 240 CR 524. A judge may not award consequential damages under CCP §128.5 when this award is unconnected to actual legal fees and court costs. *Brewster v Southern Pac. Transp. Co.* (1991) 235 CA3d 701, 710–711, 1 CR2d 89 (judge improperly awarded $139,103 as sanctions for defendant's costs in closing one line of its railroad operations). In addition, a judge may not use CCP §128.5 to deny a motion for a trial de novo as a sanction for the moving party's failure to participate in judicially mandated arbitration. *Salowitz Org., Inc. v Traditional Indus., Inc.* (1990) 219 CA3d 797, 805–806, 268 CR 493.

The liability imposed by CCP §128.5 is in addition to any other liability imposed by law for acts or omissions within the purview of this statute. CCP §128.5(e). Thus, a judge may impose sanctions in addition to or as an alternative to contempt or other liability. A judge may also impose punitive damage "sanctions" against a plaintiff who has sued a felony victim for injuries arising out of a felony for which the plaintiff was convicted. See CCP §128.5(d) (plaintiff must be guilty of fraud, oppression, or malice in maintaining action).

For checklists of contempt procedure, see §§3.7–3.9. For a checklist of the sanctions procedure under CCP §128.5, see §3.12. For checklists of other sanctions alternatives, see §§3.13–3.19.

3. Adequacy of Notice of Sanctions Request

a. [§3.63] Notice Requirements

Sanctions under CCP §128.5 may be imposed only on (1) notice contained in a party's moving or responding papers, or (2) the court's own motion, after notice and opportunity to be heard. CCP §128.5(c). Adequate notice is mandated not only by CCP §128.5 but also by the due process clauses of the federal and state constitutions. *Sole Energy Co. v Hodges* (2005) 128 CA4th 199, 207, 26 CR3d 823; *Marriage of Reese & Guy* (1999) 73 CA4th 1214, 1220, 87 CR2d 339. See *Bauguess v Paine* (1978) 22 C3d 626, 150 CR 461 (court's inherent and supervisory powers did not include authority to award attorneys' fees as alternative to contempt; procedure that was used violated attorney's due process rights; this case led to enactment of CCP §128.5). Therefore, sanctions under CCP §128.5 may not be imposed on a party's ex parte application. *Sole Energy Co. v Hodges*, *supra*, 128 CA4th at 207; *O'Brien v Cseh* (1983) 148 CA3d 957, 961, 196 CR 409 (notice by telephone to attorney's secretaries complied

with local court rule on ex parte matters, but failed to meet notice requirements of CCP §128.5(b) or due process clauses).

When a party files a notice of motion seeking sanctions under CCP §128.7, a judge may not award sanctions under CCP §128.5, because notice that sanctions are sought under §128.7 is insufficient notice to the opposing party that sanctions might be awarded under §128.5. *Marriage of Reese & Guy*, *supra*, 73 CA4th at 1219–1221 (because of significant differences between CCP §§128.7 and 128.5, motion for sanctions under former does not provide basis for imposing sanctions under latter). See *Levy v Blum* (2001) 92 CA4th 625, 638, 112 CR2d 144 (in accord).

b. [§3.64] Adequacy Determined on Case-by-Case Basis

Code of Civil Procedure §128.5 does not specify the amount of notice required before sanctions may be imposed. Therefore, adequacy does not depend on a fixed number of days' notice but should be determined on a case-by-case basis to satisfy basic due process requirements. *Marriage of Quinlan* (1989) 209 CA3d 1417, 1422, 257 CR 850 (on oral request for sanctions, judge failed to give notice of grounds and consequently denied reasonable opportunity to respond); *Lesser v Huntington Harbor Corp.* (1985) 173 CA3d 922, 932, 219 CR 562 (one-day notice was inadequate in complex, expensive case). In determining what constitutes sufficient notice in a given case, the judge should consider the complexity of the sanctions issues (173 CA3d at 932–933), the amount at stake in the litigation (173 CA3d at 932–933), the amount of the sanctions requested (*Marriage of Quinlan*, *supra*, 209 CA3d at 1423), and whether a separate hearing was requested (209 CA3d at 1423).

The notice must identify the party against whom the sanctions are sought and must specify valid grounds for imposing the sanctions. See 209 CA3d at 1421 (notice failed to give clear warning of anticipated grounds for award).

Defects in the notice are waived if not raised at the sanctions hearing. *Jansen Assocs. v Codercard, Inc.* (1990) 218 CA3d 1166, 1170, 267 CR 516; *M. E. Gray Co. v Gray* (1985) 163 CA3d 1025, 1034, 210 CR 285.

c. [§3.65] Request Included in Party's Opposition Papers

Courts in some cases have suggested that "adequate" notice should consist of the minimum amount required for service of the papers in which a sanctions request has been included. One court has suggested in dictum, for example, that the ten-day response time of CCP §1005(b) would be "jurisdictional to due process requirements" for a sanctions request included in papers opposing a motion. The court added that in some cases, however, the minimum service time of ten days may be inadequate notice for such a request. See *Ellis v Roshei Corp.* (1983) 143 CA3d 642, 647 n5, 192 CR 57 (opposition papers to demurrer decided under former statute

providing for five-day response time). Relying on *Ellis*, another court suggested in dictum that a sanctions request would be timely if included in response papers filed on shortened notice. See *M. E. Gray Co. v Gray* (1985) 163 CA3d 1025, 1033, 210 CR 285 (issue of inadequate notice waived for failure to object in trial court). Despite these suggestions, the consistent theme in appellate decisions discussing adequacy of notice is that adequacy truly depends on the circumstances in each case. See *Lesser v Huntington Harbor Corp.* (1985) 173 CA3d 922, 933, 219 CR 562 (less than one day's notice was inadequate in complex, costly, lengthy case to show that entire lawsuit was brought in good faith).

Note that CCP §1005(b) now provides that opposition papers must be filed and served at least nine court days before the hearing.

d. [§3.66] Immediate Imposition on Oral Request During Hearing

A judge may on the judge's own motion impose sanctions based on a party's oral request during a hearing. Due process does not necessarily require that the motion be heard on a separate and later hearing date. A separate hearing is not required, for example, when the substantive basis for sanctions is very narrow, the requested amount is small, the need to prepare a defense is minimal, and no request for a separate hearing is made. Due process concerns can be satisfied if the judge or the moving party gives clear warning of the anticipated grounds for sanctions, and counsel receives an adequate opportunity to present an oral response. *Marriage of Quinlan* (1989) 209 CA3d 1417, 1423, 257 CR 850 (sanctions order reversed because of lack of clear warning of anticipated grounds). Procedurally, the immediate sanctions award must be based on the judge's own motion, because CCP §128.5(c) does not permit the award simply on a party's oral request.

4. [§3.67] Evidentiary Hearing Required

The party against whom sanctions are sought must be given a reasonable opportunity to be heard (CCP §128.5(c)), including an opportunity to subpoena and produce evidence and witnesses or otherwise defend against the request; however, there is no right to a jury trial. *Lesser v Huntington Harbor Corp.* (1985) 173 CA3d 922, 934, 219 CR 562; *Lavine v Hospital of the Good Samaritan* (1985) 169 CA3d 1019, 1028, 215 CR 708. The hearing must address the issue of whether a sanctionable offense was committed; it is a violation of due process to hold a hearing solely on the issue of the amount of the sanctions. See *Lesser v Huntington Harbor Corp.*, *supra*, 173 CA3d at 934.

The scope of the hearing is within the judge's discretion, as with motions generally. *Lavine v Hospital of the Good Samaritan*, *supra*, 169 CA3d at 1028, citing with approval *Reifler v Superior Court* (1974) 39

CA3d 479, 485, 114 CR 356 (at law and motion hearings, judge may exercise discretion to exclude oral testimony). The judge must be careful, however, to maintain objectivity while conducting the hearing and not predetermine the award of sanctions based solely on events that have already occurred during the case. *Lesser v Huntington Harbor Corp., supra,* 173 CA3d at 935.

5. Detailed, Written Order Required

a. [§3.68] Detailed Recitation of Facts

An order imposing sanctions must be in writing and recite in detail the conduct or circumstances justifying the order. CCP §128.5(c); *Levy v Blum* (2001) 92 CA4th 625, 635, 112 CR2d 144. The order should give a factual recital of the circumstances with reasonable specificity. *Lavine v Hospital of the Good Samaritan* (1985) 169 CA3d 1019, 1029, 215 CR 708. The statement "good cause appearing" is insufficient (*Caldwell v Samuels Jewelers* (1990) 222 CA3d 970, 977, 272 CR 126), as is the statement that "the court will allow attorneys' fees as follows . . . ." *First City Props., Inc. v MacAdam* (1996) 49 CA4th 507, 514, 56 CR2d 680.

An order meets the requirements of CCP §128.5 if it states that "a motion had been brought and prosecuted after the relief sought had been fully afforded and that it was the third application for the same relief." *Lavine v Hospital of the Good Samaritan, supra,* 169 CA3d at 1029. Similarly, a judge's order, which imposed sanctions against a party for filing motions raising the same claims the judge had previously denied, was held sufficient, when it stated, "[T]here is nothing significantly legally or factually different in either of the above captioned motions that the court has not heard/ruled on previously." *Harris v Rudin, Richman & Appel* (2002) 95 CA4th 1332, 1344–1345, 116 CR2d 552.

Mere conclusions in the words of the statute, however, are insufficient, *e.g.*, an order is insufficient if it states that a motion "was not made in good faith, was frivolous and caused unnecessary delay," and the court imposed sanctions on counsel for the moving party in a specified amount under CCP §128.5. *Lavine v Hospital of the Good Samaritan, supra,* 169 CA3d at 1028.

b. [§3.69] Incorporation of Party's Papers

Code of Civil Procedure §128.5(c) requires a judge to set forth the specific circumstances giving rise to an award of sanctions, but the judge is not prohibited from incorporating by reference papers that adequately set forth the conduct, circumstances, and legal arguments that provide the bases for the judge's conclusions. The judge may prepare the order, direct counsel to prepare it, or incorporate by reference some specific portions of a party's papers. *Young v Rosenthal* (1989) 212 CA3d 96, 124, 260 CR

369 (judge properly incorporated plaintiff's memorandum of points and authorities as specification of reasons for sanctions).

The judge should use great caution in incorporating a party's papers to ensure the order (1) complies with the specificity requirements of CCP §128.5(c), and (2) accurately reflects the judge's decision. See, *e.g.*, *Marriage of Quinlan* (1989) 209 CA3d 1417, 1421, 257 CR 850 (grounds actually recited in formal order prepared by counsel had not been asserted as basis for sanctions by either counsel or judge).

c. [§3.70] Sufficiency of Minute Order

The courts have disagreed about whether a formal written order is required in interpretations of the similar requirements of CCP §§128.5 and 177.5. *Jansen Assocs. v Codercard, Inc.* (1990) 218 CA3d 1166, 1171, 267 CR 516 (minute order was defective because it recited that attorney's failure to appear was willful but made no direct reference to his conduct). See also *Harris v Rudin, Richman & Appel* (2002) 95 CA4th 1332, 1344–1345, 116 CR2d 552 (minute order sufficiently apprised parties—and reviewing court—of reasons why sanctions were imposed); *Laborers' Int'l Union of N. Am., AFL-CIO, Local 89 v El Dorado Landscape Co.* (1989) 208 CA3d 993, 1009, 256 CR 632 (under CCP §177.5, court found sufficient reasons for sanctions in minute order, without questioning validity of this type of order); *Olson Partnership v Gaylord Plating Lab, Inc.* (1990) 226 CA3d 235, 241, 276 CR 493 (court declined to follow *Jansen*'s holding that minute order is insufficient if judge set forth grounds in colloquy with sanctioned attorney on record, and reporter's transcript and minute order revealed specific reasons for imposition of sanctions).

☛ JUDICIAL TIP: Most judges heed Jansen and issue formal written orders whenever they impose sanctions, or they make minute orders or tentative rulings that state the reasons and immediately follow them up with formal written orders containing the necessary factual recital. Although judges usually rely on the attorney for the prevailing party to draft a proposed order in other situations, many judges do the drafting themselves when the order imposes sanctions.

d. [§3.71] Collateral Estoppel Effect of Order Denying Sanctions

An order denying sanctions under CCP §128.5 may not be used to collaterally estop a subsequent action for malicious prosecution. Issues resolved on a routine sanctions motion are not entitled to preclusive effect in a later action. *Wright v Ripley* (1998) 65 CA4th 1189, 1191, 77 CR2d 334. Thus, a judge improperly granted defendants' motion for judgment

on the pleadings in a malicious prosecution action on the ground that the action was precluded by collateral estoppel because the court in the underlying action had denied the current plaintiff's (and former defendant's) motion for sanctions under CCP §128.5, finding that "bad faith" was not established. 65 CA4th at 1191–1196. Code of Civil Procedure §128.5 does not replace suits for malicious prosecution, because it serves a different purpose. A malicious prosecution action is intended to compensate the wronged litigant; CCP §128.5 was enacted to broaden the courts' power to manage their calendars and expedite litigation. 65 CA4th at 1195. A court's decision on a sanctions motion may be influenced by factors extrinsic to a malicious prosecution action. 65 CA4th at 1195.

6. [§3.72] Appellate Review

An appeal may be taken from an order or interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds $5000. CCP §904.1(a)(11), (12). But multiple orders for monetary sanctions against different defendants, each under the appealable limit, cannot be aggregated to reach the threshold level for appeal. *Calhoun v Vallejo City Unified Sch. Dist.* (1993) 20 CA4th 39, 41, 24 CR2d 337.

An order or judgment awarding sanctions of $5000 or less may be reviewed after entry of final judgment in the main action or, in the appellate court's discretion, on petition for an extraordinary writ. CCP §904.1(b).

Appellate courts also routinely review orders *denying* sanctions, even though most cases do not specifically address the issue of whether or not these orders are appealable. See *Shelton v Rancho Mortgage & Inv. Corp.* (2002) 94 CA4th 1337, 1343, 115 CR2d 82. A postjudgment order denying a request for sanctions is appealable under CCP §904.1(a)(2). 94 CA4th at 1343–1345.

In general, an appeal from a sanctions order may normally only be filed by the attorney who was sanctioned. *20th Century Ins. Co. v Choong* (2000) 79 CA4th 1274, 1276–1277, 94 CR2d 753. However, an attorney's employer has standing to appeal from a sanctions order imposed on the attorney, while acting in the course and scope of his or her employment, because the employer is required by Lab C §2802 to reimburse its attorney-employee for the amount of the sanctions. 79 CA4th at 1276–1277.

An award of monetary sanctions will only be reversed on a finding that the award was a clear abuse of the judge's discretion. *Gemini Aluminum Corp. v California Custom Shapes, Inc.* (2002) 95 CA4th 1249, 1262–1263, 116 CR2d 358; *Shelton v Rancho Mortgage & Inv. Corp., supra,* 94 CA4th at 1345–1346.

Inherent in appellate review of a judge's exercise of discretion in imposing sanctions is a consideration of whether imposition of sanctions was a violation of due process. *Winikow v Superior Court* (2000) 82 CA4th 719, 727, 98 CR2d 413.

An appellate court has inherent authority to impose sanctions for the filing of a frivolous motion on appeal. The rationale of CCP §128.5—to compensate the prevailing party as well as to control burdensome and unnecessary legal tactics—is equally applicable to appellate proceedings. *Dana Commercial Credit Corp. v Ferns & Ferns* (2001) 90 CA4th 142, 146–147, 108 CR2d 278.

G. Sanctions Under CCP §128.7

1. [§3.73] Background

Critical Date. Sanctions may be imposed under CCP §128.7 only in cases filed on or after January 1, 1995; sanctions may be imposed under CCP §128.5 only in cases filed before 1995. *Olmstead v Arthur J. Gallagher & Co.* (2004) 32 C4th 804, 807, 811, 819, 11 CR3d 298. See discussion at §3.50.

When a party files a notice of motion seeking sanctions under CCP §128.7, a judge may not award sanctions under CCP §128.5, because notice that sanctions are sought under §128.7 is insufficient notice to the opposing party that sanctions might be awarded under §128.5. *Marriage of Reese & Guy* (1999) 73 CA4th 1214, 1219–1221, 87 CR2d 339 (because of significant differences between §128.7 and §128.5, motion for sanctions under former does not provide basis for imposing sanctions under latter). See *Levy v Blum*, *supra*, 92 CA4th at 638 (in accord).

Federal Rules of Civil Procedure 11. Section 128.7 was adopted by the Legislature as part of an effort to bring California sanctions practice into conformity with Fed R Civ P 11. *Olmstead v Arthur J. Gallagher & Co.*, *supra*, 32 C4th at 810; *Guillemin v Stein* (2002) 104 CA4th 156, 167, 128 CR2d 65; *Goodstone v Southwest Airlines Co.* (1998) 63 CA4th 406, 419, 423–424, 73 CR2d 655. See §3.75. Like rule 11, CCP §128.7 makes sanctions, including an award of attorney's fees, contingent on violation of the implied certification that pleadings and other papers filed with the court have factual and legal merit and are not being presented for an improper purpose. *Levy v Blum*, *supra*, 92 CA4th at 636. Sanctions under CCP §128.7 are not designed to be punitive in nature, but rather to promote compliance with statutory standards of conduct. *Cromwell v Cummings* (1998) 65 CA4th Supp 10, 14, 76 CR2d 171.

Under both CCP §128.7 and rule 11, there are basically three types of submitted papers that warrant sanctions: (1) papers that are factually frivolous (not well grounded in fact); (2) papers that are legally frivolous (not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law); and (3) papers interposed for an

improper purpose. *Guillemin v Stein, supra,* 104 CA4th at 167. A filing is "frivolous" if it is both baseless and made without a reasonable and competent inquiry. *Holgate v Baldwin* (9th Cir 2005) 425 F3d 671.

Person Against Whom Sanctions Award May Be Made. Sanctions under CCP §128.7 cannot be awarded in favor of a party against its own attorney. See *Mark Indus., Ltd. v Sea Captain's Choice, Inc.* (9th Cir 1995) 50 F3d 730, 732 (interpreting Fed R Civ P 11). Monetary sanctions may not be awarded against a party whose attorney asserts frivolous legal contentions in violation of CCP §128.7(b)(2). CCP §128.7(d)(1); *Banks v Hathaway, Perrett, Webster, Powers & Chrisman* (2002) 97 CA4th 949, 952, 118 CR2d 803. Monetary responsibility for such a violation is more properly placed solely on the party's attorney. *Cromwell v Cummings, supra,* 65 CA4th Supp at 13 n4. However, monetary sanctions may be imposed against a represented party for violating other provisions of CCP §128.7(b), *e.g.*, for presenting a document for an improper purpose, to harass, cause unnecessary delay, or needless increase in the cost of litigation in violation of CCP §128.7(b)(1), for making allegations or other factual contentions lacking evidentiary support in violation of CCP §128.7(b)(3), or for making denials of factual allegations not warranted by the evidence in violation of CCP §128.7(b)(4). *Laborde v Aronson* (2001) 92 CA4th 459, 466–467, 112 CR2d 119 (judge could impose sanctions against both attorney and client under CCP §128.7(b)(1)).

Award of sanctions to attorney in pro per. An attorney who represents himself or herself may be awarded sanctions under CCP §128.7 for expenses incurred in the defense of a meritless claim. 92 CA4th at 467–469 (affirming award of reasonable attorney's fees, citing cases interpreting Fed R Civ P 11(c)(2), and finding that award furthers intent of CCP §128.7). See §3.61, discussing split of authority about whether judge may award attorney's fees as sanction under CCP §128.5 to a self-representing attorney.

Procedural Requirements. The party seeking sanctions must make a formal, written noticed motion. CCP §128.7(c)(1); *Barnes v Department of Corrections* (1999) 74 CA4th 126, 135–136, 87 CR2d 594. The moving party must strictly comply with this requirement. 74 CA4th at 135–136 (doctrine of substantial compliance does not apply). Informal notice of an intention to seek sanctions in the future does not serve as a substitute for a formal noticed motion. 74 CA4th at 135–136.

For a checklist of the CCP §128.7 procedure, see §3.13.

2. [§3.74] Comparison Between CCP §128.5 and §128.7

Nexus-to-paper requirement. Sanctions may be imposed under CCP §128.7 against an attorney, law firm, or party for presenting or advocating a paper primarily for an improper purpose (such as to harass or cause unnecessary delay or to needlessly increase the cost of the litigation), or

for presenting or advocating a paper that contains an unwarranted legal contention or an unsupported allegation. CCP §128.7(b). Conduct, however, may not be sanctioned under CCP §128.7 without establishing the nexus to a court paper. See CCP §128.7(b).

A judge may not base an award of sanctions under CCP §128.7 on misconduct by an attorney or party in the proceeding that does not involve a pleading, motion, or other filing. See *Christian v Mattel, Inc.* (9th Cir 2002) 286 F3d 1118, 1129 (in imposing sanctions under Fed R Civ P 11, judge may not consider attorney's discovery abuses or misstatements made during hearing, but only whether complaint was baseless). See also *Truesdell v Southern Cal. Permanente Med. Group* (9th Cir 2002) 293 F3d 1146, 1155 (judge may not consider *other* cases in which plaintiff's counsel had filed frivolous complaints against defendant).

Possible sanctions. Possible sanctions include a monetary sanction payable to the court, a monetary sanction payable to a party, reimbursing that party for attorneys' fees and other expenses incurred as a result of the violation, and nonmonetary sanctions such as the dismissal of a claim or the preclusion of a defense. See CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—BEFORE TRIAL §§17.42–17.49 (Cal CJER 1995). The sanction must be limited to what is sufficient to deter repetition of the offending conduct or comparable conduct by others similarly situated. CCP §128.7(d). See *In re Yagman* (9th Cir 1986) 796 F2d 1165, 1183. See also *Christian v Mattel, Inc., supra,* 286 F3d at 1130 (judge should ensure that time spent by defendant's attorney was reasonably and appropriately spent in relation to both "patent frivolousness" of plaintiff's complaint and services directly caused by sanctionable conduct). Most of the provisions of CCP §128.7 were derived verbatim from Federal Rules of Civil Procedure 11 as it read in 1994. See §3.75.

Major differences between CCP §128.5 and CCP §128.7. There are a number of differences between CCP §128.5 and §128.7. The requirement of CCP §128.7(b) that the conduct being sanctioned must have a direct connection to a paper presented by the alleged offender appears to exclude the imposition of CCP §128.7 sanctions for conduct that has been held to be sanctionable under CCP §128.5, *e.g.*, falsely declaring readiness for trial and then dismissing the action, or causing the opposing party to incur substantial unnecessary trial preparation expenses. See *Mungo v UTA French Airlines* (1985) 166 CA3d 327, 333, 212 CR 369. Code of Civil Procedure §128.7 also imposes a lower threshold for sanctions than is required under CCP §128.5; CCP §128.7 requires only that the conduct be "objectively unreasonable," while CCP §128.5 also requires "a showing of subjective bad faith." *Guillemin v Stein* (2002) 104 CA4th 156, 167, 128 CR2d 65.

Major differences between CCP §128.5 and CCP §128.7 are set out in the following table.

CCP §128.5	CCP §128.7
Applies to actions or tactics. CCP §128.5(a).	Applies to pleadings, petitions, or other papers presented to the court. CCP §128.7(a).
Actions or tactics must be frivolous (totally without merit or for the purpose of harassing). CCP §128.5(b)(2).	The filing of papers may be subject to sanctions if unwarranted by existing law or if there is no evidentiary support. CCP §128.7(b).
May be used in discovery proceedings.	May not be used in discovery proceedings. CCP §128.7(g).
There is no waiting period; a motion for sanctions may be filed immediately.	Party against whom sanctions are sought has 21 days (or other period prescribed by the court) to withdraw the challenged paper; if withdrawn, sanctions motion may not be filed with court. CCP §128.7(c)(1).
Many courts have held that there must be a determination of both objective and subjective bad faith in imposing sanctions under CCP §128.5. See, *e.g.*, *Dolan v Buena Eng'rs, Inc.* (1994) 24 CA4th 1500, 1506, 29 CR2d 903.	Only objective bad faith must be shown ("inquiry [must be] reasonable under the circumstances"). CCP §128.7(b).
Sanctions imposed under CCP §128.5 are monetary sanctions in the form of expenses incurred as a result of bad-faith actions or tactics. CCP §128.5(a).	Monetary sanctions are limited; primary purpose is to deter repetition of conduct. CCP §128.7(d).
Requires no special certification of pleadings or other papers.	Requires every attorney or unrepresented party who signs, files, or submits a pleading, petition, notice of motion, or similar paper to certify that facts and legal theories are valid based on reasonable inquiry. CCP §128.7(b).
Motion may be part of other moving or responding papers. CCP §128.5(c).	Sanctions must be sought in separate motion. CCP §128.7(c)(1).
Judge need not consider moving party's conduct in determining sanctions.	In determining sanctions, judge must consider whether party seeking sanctions has exercised due diligence. CCP §128.7(c).
Order imposing sanctions must be written and must set forth in detail the circumstances justifying the order. CCP §128.5(c). Sanctions may be imposed against party and/or party's attorney. CCP §128.5(a).	Does not appear to require a written order (judge must describe the conduct and explain the basis for the sanctions). CCP §128.7(e). Sanctions may be imposed against attorney or unrepresented party, but not against represented party. See CCP §128.7(a).

3. [§3.75] Duty To Investigate Required by CCP §128.7

Note: Because CCP §128.7 so closely tracks Federal Rules of Civil Procedure 11 (as it read in 1994), federal cases interpreting Rule 11 are likely to have some bearing on interpreting and applying CCP §128.7. See *Guillemin v Stein* (2002) 104 CA4th 156, 167, 128 CR2d 65 (federal case law construing rule 11 is persuasive authority with regard to meaning of CCP §128.7); *Hart v Avetoom* (2002) 95 CA4th 410, 413, 115 CR2d 511 (in examining provisions of CCP §128.7, California courts may look to federal decisions interpreting federal rule).

Certification requirement. Code of Civil Procedure §128.7(b) requires an attorney or unrepresented party who presents a paper to the court, or later advocates it, to certify that to the best of that person's knowledge, information, and belief, the paper is not presented primarily for an improper purpose and that it does not contain an unwarranted legal or unsupported factual claim or an unwarranted denial of a factual claim. This knowledge, information, and belief must have been formed following an inquiry that was reasonable under the circumstances. See CCP §128.7(b).

The term "presenting" includes signing, filing, or submitting a paper. CCP §128.7(b). The term "paper" includes every pleading, petition, written notice of motion, or other similar paper. CCP §128.7(b). The conduct being sanctioned must have a direct connection to such a paper. CCP §128.7(b). The advocacy being sanctioned must relate to a paper previously presented by the offender. See CCP §128.7(b); *Christian v Mattel, Inc.* (9th Cir 2002) 286 F3d 1118, 1129 (court cannot consider other misconduct by attorney, such as discovery abuses or oral misrepresentations to court during hearing).

Duty imposed on attorney. Similar language in Rule 11 has been interpreted to impose an affirmative obligation on the part of the attorney (or unrepresented party) to investigate the validity of the legal and factual contentions made in the papers filed by the attorney (or party). See *Business Guides, Inc. v Chromatic Communications Enters., Inc.* (1991) 498 US 533, 550, 111 S Ct 922, 112 L Ed 2d 1140; *Christian v Mattel, Ins., supra*, 286 F3d at 1127. The test is an objective one. 286 F3d at 1127. The reasonable person against whom an attorney's conduct is measured is a competent attorney admitted to practice before the court. See *Zaldivar v City of Los Angeles* (9th Cir 1986) 780 F2d 823, 830.

When the complaint is the primary focus of rule 11 proceedings, the court must conduct a two-part inquiry to determine (1) whether the complaint is legally or factually baseless from an objective perspective, and (2) if the attorney has conducted a reasonable and competent inquiry before signing and filing it. *Holgate v Baldwin* (9th Cir 2005) 425 F3d 671, 676; *Christian v Mattel, Inc., supra*, 286 F3d at 1127. The attorney's

(or party's) duty to make reasonable inquiry increases in direct proportion to the information available as the litigation proceeds. See *Townsend v Holman Consulting Corp.* (9th Cir 1990) 929 F2d 1358, 1364. Sanctions may not be imposed against an attorney who fails to make a reasonable inquiry about the facts before filing the complaint if after-acquired evidence establishes that the complaint was well-founded. *In re Keegan Mgt. Co.* (9th Cir 1996) 78 F3d 431, 434. When a complaint alleges multiple causes of action, the fact that at least one claim is found not to be frivolous does not preclude the court from awarding sanctions based on other claims in the complaint that are found to be frivolous. *Holgate v Baldwin, supra,* 425 F3d at 677. In addition, the fact that an attorney withdraws as counsel due to a conflict of interest does not preclude the court from imposing sanctions against the attorney based on a filing the attorney made before withdrawing. 425 F3d at 677.

The California Supreme Court has held that these provisions apply with respect to the imposition of sanctions under CCP §128.7. It specifically held that both attorneys and their clients have a duty to make a reasonable inquiry before filing papers with the court, and must have an actual belief that the allegations set forth in these papers are true. *Bockrath v Aldrich Chem. Co., Inc.* (1999) 21 C4th 71, 82, 86 CR2d 846. A plaintiff should not file a complaint against a specific named defendant unless, after reasonable inquiry, the plaintiff actually believes that the defendant is liable for the plaintiff's damages. 21 C4th at 82. If the plaintiff lacks sufficient evidence to support particular allegations against a defendant, but believes such evidence is likely to be obtained through further investigation or discovery, the complaint must specifically identify these allegations. 21 C4th at 82.

Duty imposed on client. Federal courts interpreting Rule 11 have also held that when the client, rather than the attorney, is in the better position to investigate the facts, the client must make a reasonable inquiry before providing the facts to the attorney. *Pan-Pacific & Low Ball Cable Television Co. v Pacific Union Co.* (9th Cir 1993) 987 F2d 594, 597.

Duty to corroborate hearsay information. Attorneys or unrepresented parties should normally corroborate hearsay information. *Unioil, Inc. v E.F. Hutton & Co.* (9th Cir 1986) 809 F2d 548, 558 (amended, rehearing denied). In that regard, it may not be reasonable for an attorney to rely on newspaper articles. *Garr v U.S. Healthcare, Inc.* (3d Cir 1994) 22 F3d 1274, 1279. If the facts seem unlikely, the attorney must make a reasonable attempt to corroborate them. See *Childs v State Farm Mut. Auto. Ins. Co.* (5th Cir 1994) 29 F3d 1018, 1025.

Factors in determining whether inquiry was reasonable. Interpreting Rule 11, the court in *Brown v Federation of State Med. Bds. of the U.S.* (7th Cir 1987) 830 F2d 1429, 1435, noted these factors for the judge to consider in deciding whether the inquiry was reasonable:

- Complexity of the facts.
- Time available for investigating the facts before presenting the pleading or other paper. *Cooter & Gell v Hartmarx Corp.* (1990) 496 US 384, 401–402, 110 S Ct 2447, 110 L Ed 2d 359 (inquiry that is reasonable a few months before complaint must be filed may not be reasonable when there is only a short time before statute of limitations expires).
- Whether another attorney initiated the case.
- Whether and to what extent the attorney was required to rely on the client's statement of the facts.

There are different considerations when the soundness of a legal argument is at issue, although the distinction between law and facts is not always an easy one to find. See *Cooter & Gell v Hartmarx Corp., supra,* 496 US at 401. In determining whether a legal argument is frivolous, the judge should consider these factors (*Brown v Federation of State Med. Bds. of the U.S., supra,* 830 F2d at 1435):

- Complexity of the legal issues.
- Whether an attorney (rather than an unrepresented party) is presenting the legal theory.
- Whether the legal theory is reasonable. In this regard, an attorney must research the law and not merely accept the client's position concerning a legal question. *Hendrix v Naphtal* (9th Cir 1992) 971 F2d 398, 400. See *Guillemin v Stein, supra,* 104 CA4th at 167–168 (sanctions were not warranted when legal contention advanced by party was "arguable"; even though it lacked persuasive force, motion was not frivolous, and party was entitled to zealously argue the point).
- Time available for researching the law.

Under CCP §128.7, an attorney or unrepresented party may be able to show that a legal contention is warranted by either providing current valid authority or by providing support for a contention that existing law should be changed. See CCP §128.7(b)(2).

4. [§3.76] Examples of Conduct That May Warrant Sanctions Under CCP §128.7

A judge may impose sanctions under CCP §128.7 for the following types of conduct:

- Against a plaintiff for filing a complaint to which the defendant has a complete defense. See *Laborde v Aronson* (2001) 92 CA4th 459, 463–465, 112 CR2d 119 (litigation privilege of CC §47 established complete defense to all causes of action); *Liberty Mut.*

Fire Ins. Co. v McKenzie (2001) 88 CA4th 681, 689–692, 105 CR2d 910 (in insurer's declaratory relief action to determine coverage, judge properly ordered insured to pay sanctions to insurer for naming claims adjuster employed by insurer as cross-defendant in his cross-complaint against insurer for breach of contract and breach of implied covenant of good faith, in contravention of well-settled law).

- Against a plaintiff after sustaining the defendant's demurrer without leave to amend. See *Banks v Hathaway, Perrett, Webster, Powers & Chrisman* (2002) 97 CA4th 949, 953–954, 118 CR2d 803 (judge loses jurisdiction to award sanctions only when order sustaining demurrer is reduced to judgment before defendant serves and files sanctions motion).
- Against a plaintiff for filing an amended complaint that is not in accordance with the judge's order sustaining the defendant's demurrer with leave to amend. See *Eichenbaum v Alon* (2003) 106 CA4th 967, 971, 131 CR2d 296.
- Against a party for filing a motion for reconsideration that does not comply with the statutory requirements for such a motion. CCP §1008(d); *Deauville Restaurant, Inc. v Superior Court* (2001) 90 CA4th 843, 852, 108 CR2d 863; *Marriage of Drake* (1997) 53 CA4th 1139, 1168–1169, 62 CR2d 466.
- Against an unrepresented plaintiff or a represented plaintiff's attorney when the defendant is granted summary judgment in an action under the California Fair Employment and Housing Act (FEHA) (Govt C §12900) based on the plaintiff's failure to exhaust administrative remedies. *Hon v Marshall* (1997) 53 CA4th 470, 478–479, 62 CR2d 11.

Although CCP §128.7(a) states that any unsigned paper "shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party," this does not compel a dismissal, nor does it rule out granting leave to amend. *Vaccaro v Kaiman* (1998) 63 CA4th 761, 767–768, 73 CR2d 829. As long as the omission of counsel's signature is capable of cure, it is an abuse of discretion for a judge to strike the plaintiff's complaint without affording leave to amend. 63 CA4th at 768–769. In enacting CCP §128.7, the Legislature did not intend that a judge must dismiss an action when counsel fails to "promptly" sign the complaint, if counsel is willing to do so belatedly. 63 CA4th at 769. There are other alternatives short of dismissal of the plaintiff's action that are sufficient to enforce the legislative policy of CCP §128.7. For example, a judge has authority under CCP §436 to require, as a condition of leave to amend, that the plaintiff pay the defendant's expenses of the motion to strike the complaint. 63 CA4th at 769.

Examples of conduct that gave rise to Rule 11 sanctions as interpreted in federal case law (which may have some bearing on interpreting and applying CCP §128.7) include:

- Pursuing lawsuit for copyright infringement against a one-person company operating out of a garage when simple checking would have shown that no infringement had occurred. *Business Guides, Inc. v Chromatic Communications Enters., Inc.* (1991) 498 US 533, 550, 111 S Ct 922, 112 L Ed 2d 1140.
- Causing delay as a result of repeated unjustified procedural moves. *Coastal Transfer Co. v Toyota Motor Sales, U.S.A.* (9th Cir 1987) 833 F2d 208, 212.
- Seeking excessive amount of damages. *Hudson v Moore Bus. Forms, Inc.* (9th Cir 1987) 836 F2d 1156, 1162.
- Naming party as a defendant only to establish venue. *Stewart v American Int'l Oil & Gas Co.* (9th Cir 1988) 845 F2d 196, 201.

5. Safe Harbor Limitations

a. [§3.77] Mandatory 21-Day Safe Harbor Provision

In general. Code of Civil Procedure §128.7 provides a 21-day safe harbor to avoid sanctions, which begins to run on service of the motion and notice of motion. *Hart v Avetoom* (2002) 95 CA4th 410, 414, 115 CR2d 511.

The purpose of the safe harbor provision is to permit an offending party to avoid sanctions by withdrawing the improper pleading during the safe harbor period. 95 CA4th at 413. This permits a party to withdraw questionable pleadings without penalty, thus saving the court and the parties time and money litigating the pleading as well as the sanctions request. Section 128.7 sanctions are designed to promote compliance with statutory standards of conduct rather than to be punitive. *Malovec v Hamrell* (1999) 70 CA4th 434, 441, 82 CR2d 712. A judge must deny the motion if the moving party fails to comply with the safe harbor provision of CCP §128.7(c)(1). *Marriage of Reese & Guy* (1999) 73 CA4th 1214, 1220 n3, 87 CR2d 339 (safe harbor provision is mandatory); *Goodstone v Southwest Airlines Co.* (1998) 63 CA4th 406, 423–424, 73 CR2d 655 (judge has no authority to disregard the safe harbor requirement); *Cromwell v Cummings* (1998) 65 CA4th Supp 10, 13–14, 76 CR2d 171. See *Holgate v Baldwin* (9th Cir 2005) 425 F3d 671 (sanctions award under rule 11 must be reversed for failure to comply with safe harbor provision, even if challenged filing is frivolous); *Retail Flooring Dealers of Am., Inc. v Beaulieu of Am., LLC* (9th Cir 2003) 339 F3d 1146, 1151 (allowing party to serve sanctions motion under rule 11 after time has expired for

opposing party to correct or withdraw challenged pleading defeats purpose of safe harbor provision).

The 21-day safe harbor limitation also applies to sanctions initiated by the judge. CCP §128.7(c)(2); *Levy v Blum* (2001) 92 CA4th 625, 637, 112 CR2d 144; *Barnes v Department of Corrections* (1999) 74 CA4th 126, 131, 87 CR2d 594. Thus, when a judge issues an order to show cause as to why sanctions should not be imposed, the judge must set the matter for hearing at least 21 days after service of the order. *Levy v Blum*, *supra*, 92 CA4th at 637.

Effect of dismissal. A judge may not order a plaintiff to pay sanctions to a defendant under CCP §128.7 for bringing an improper action against the defendant after the plaintiff has dismissed the action. *Hart v Avetoom*, *supra*, 95 CA4th at 413–415. Allowing a defendant to move for sanctions after the conclusion of the case would defeat the purpose of the safe harbor provision, *i.e.*, to allow the offending party to take remedial action. 95 CA4th at 414–415.

However, a judge may award sanctions under CCP §128.7 against a plaintiff that voluntarily dismisses the action (with or without prejudice) *after* the defendant has filed a motion for sanctions. *Eichenbaum v Alon* (2003) 106 CA4th 967, 975, 131 CR2d 296. In such a case, the defendant moves for sanctions only after the plaintiff has been allowed the 21-day safe harbor period to correct its sanctionable conduct, but has not done so. In these circumstances, the plaintiff's belated abandonment of the case does not fulfill the deterrent purposes of CCP §128.7, and the policies favoring allowance of sanctions remain notwithstanding the dismissal. 106 CA4th at 975–976. This construction is consistent with CCP §128.7(d)(2), which provides that the court may not award monetary sanctions on its own motion unless it has issued an order to show cause before a voluntary dismissal. The plain implication of this language is that a judge may award sanctions if a voluntary dismissal comes *after* a sanctions motion is filed. 106 CA4th at 975–976.

b. [§3.78] Parties' Respective Obligations

A party seeking sanctions under CCP §128.7 must serve, but not file, a notice of motion describing the specific conduct that allegedly violated CCP §128.7(b); the motion may not be coupled with any other motion or request. CCP §128.7(c)(1). A party served with the notice of motion seeking sanctions has a safe harbor period of 21 days from that service to withdraw or appropriately correct the challenged paper, claim, defense, contention, allegation or denial; such a withdrawal or correction will render the motion moot. CCP §128.7(c)(1). Thus, the offending party may avoid sanctions altogether by withdrawing or correcting the challenged document. *Hart v Avetoom* (2002) 95 CA4th 410, 413, 115 CR2d 511.

In addition to withdrawing or correcting the challenged pleading, the offending party must also give notice to the moving party that it has taken that step. *Liberty Mut. Fire Ins. Co. v McKenzie* (2001) 88 CA4th 681, 692, 105 CR2d 910. Absent notice, the moving party has no knowledge that the problem has been resolved and consequently will proceed (as it warned the offending party it would do) with filing the sanctions motion with the court. This requires the unnecessary expenditure of time by the court and the moving party's attorney that could have been avoided if notice had been given. When the offending party fails to give notice (and offers no explanation for that omission), the court has the authority to impose the sanctions requested. 88 CA4th at 692.

If a withdrawal or correction is not made within the 21-day period, the moving party may file the motion. See CCP §128.7(c)(1). The moving papers that are filed must be the same papers that were served on the opposing party. *Hart v Avetoom, supra,* 95 CA4th at 414–415.

c. [§3.79] Judge's Authority To Shorten or Extend 21-Day Safe Harbor Period

A judge may prescribe a safe harbor period that is shorter or longer than 21 days. CCP §128.7(c)(1). Because CCP §1005(b) requires motions to be filed at least 16 court days before the hearing, CCP §128.7(c)(1) effectively requires a motion for sanctions to be served at least 43 days before it will be heard (21 days required by CCP §128.7(c)(1), plus 16 court days, plus 6 intervening weekend days), unless an order shortening time is obtained. *Cromwell v Cummings* (1998) 65 CA4th Supp 10, 13 n3, 76 CR2d 171; see CCP §1005(b) (court or judge may prescribe shorter time). This 43-day period is further extended under CCP §1005(b) when the notice of motion is served by mail.

d. [§3.80] Postjudgment Motion for Sanctions

A judge lacks authority to grant a party's postjudgment motion for sanctions. Such a motion does not comply with the safe harbor provision of CCP §128.7(c)(1). *Barnes v Department of Corrections* (1999) 74 CA4th 126, 129–135, 87 CR2d 594. A party must serve any motion for sanctions before the final disposition of the claimed sanctionable conduct in order to give the opposing party an opportunity to correct the allegedly offending conduct and avoid sanctions. 75 CA4th at 130, 132–133, 135. For example, an order sustaining a demurrer without leave to amend does not bar a motion for CCP §128.7 sanctions unless the order is reduced to a judgment before the sanctions motion is served and filed. *Banks v Hathaway, Perrett, Webster, Powers & Chrisman* (2002) 97 CA4th 949, 954, 118 CR2d 803. However, a sanctions motion that is served and filed after the action has been dismissed is untimely. *Hart v Avetoom* (2002) 95 CA4th 410, 413–415, 115 CR2d 511.

H. Other Sanctions

1. Violation of Lawful Court Order Under CCP §177.5

a. [§3.81] Court's Authority To Impose Sanctions Payable to Court

Scope of authority. A judicial officer may impose reasonable monetary sanctions for any violation of a lawful court order without good cause or substantial justification by a witness, a party, a party's attorney, or both a party and a party's attorney. CCP §177.5. See *In re Woodham* (2001) 95 CA4th 438, 445, 115 CR2d 431 (sanctions properly imposed against Board of Prison Terms for its failure to comply with court orders for processing administrative appeals); *20th Century Ins. Co. v Choong* (2000) 79 CA4th 1274, 1277–1279, 94 CR2d 753 (second sanction imposed for failure to pay first sanction that was imposed for failing to file settlement conference statement); *Laborers' Int'l Union of N. Am., AFL-CIO, Local 89 v El Dorado Landscape Co.* (1989) 208 CA3d 993, 1009, 256 CR 632 (noncompliance with time limits in San Diego County court "fast-track" rules); but see *Winikow v Superior Court* (2000) 82 CA4th 719, 726–727, 98 CR2d 413 (judge abused discretion in imposing sanction on plaintiff's counsel for failure to serve notice of status conference hearing on defendant who had not yet appeared).

Sanctions under CCP §177.5 may be imposed in both civil and criminal cases. *People v Tabb* (1991) 228 CA3d 1300, 1310, 279 CR 480. These sanctions may not be used, however, to curb advocacy before the court (CCP §177.5), or to coerce a settlement (*Barrientos v City of Los Angeles* (1994) 30 CA4th 63, 72, 35 CR2d 520). But if the court imposes a sanction against an attorney, which the attorney fails to pay, the court is not required to attempt to collect the sanction through a writ of execution before it may impose a second sanction against the attorney for failing to comply with the first sanction. *20th Century Ins. Co. v Choong*, *supra*, 79 CA4th at 1278 (court has right to impose second sanction to compel obedience to its lawful orders).

A judge may impose monetary sanctions under CCP §177.5 against an attorney whose improper exercise of peremptory challenges leads to a mistrial, but only if the judge has admonished the attorney that a repetition of specific conduct will result in a monetary sanction. Such a statement by the judge is tantamount to an order not to repeat the conduct and is sufficient for purposes of CCP §177.5. *People v Muhammad* (2003) 108 CA4th 313, 315, 133 CR2d 308 (without prior admonition, CCP §177.5 would not apply). See *People v Willis* (2002) 27 C4th 811, 821, 118 CR2d 301 (judge, with assent of aggrieved party, may issue appropriate orders short of outright dismissal of remaining jurors, including assessment of sanctions against counsel whose challenges exhibit group bias that are severe enough to guard against a repetition of the improper conduct);

People v Boulden (2005) 126 CA4th 1305, 1314, 24 CR3d 811 (judge's order at outset of trial threatening imposition of monetary sanctions of up to $1500 for any violation of *Wheeler* upheld).

Any violation of CCP §206, prohibiting contacting jurors after the conclusion of a criminal case except in specified circumstances, is considered a violation of a lawful court order, and monetary sanctions under CCP §177.5 may be imposed. CCP §206(e).

Amount of sanctions. The sanctions may not exceed $1500 and are payable to the court. CCP §177.5. The amount of the sanctions need not relate to the actual cost to the court traceable to the violation; the judicial officer has discretion to impose any reasonable amount up to $1500. *20th Century Ins. Co. v Choong, supra,* 79 CA4th at 1278–1279; *People v Tabb, supra,* 228 CA3d at 1311–1312.

Code of Civil Procedure §177.5 sanctions combined with other sanctions. Monetary sanctions payable to the court under CCP §177.5 may be combined with other sanctions, *i.e.*, they may be imposed notwithstanding any other provision of law. See CCP §§177.5, 1209–1222. The violation of a court order may also be punished as contempt (CCP §178), but the indirect contempt procedure must be used because the violation of an order normally occurs outside the court's presence. See CCP §1211. It may be easier, however, to impose sanctions under the procedure of CCP §177.5 for the same conduct. For a checklist of the CCP §177.5 sanctions procedure, see §3.14. For a checklist of the indirect contempt procedure, see §3.8. For a discussion of sanctions under Cal Rules of Ct 227 for violation of a state rule of court, see §3.100.

Other sources. For a discussion of imposing sanctions under CCP §177.5 in various postjudgment proceedings, see CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—AFTER TRIAL §§7.5 (judgment debtor's failure to answer written interrogatories), 7.30 (failure to appear for examination), 9.15 (failure to comply with demand for acknowledgment of satisfaction of judgment) (Cal CJER 1998).

b. [§3.82] Procedure

Sanctions under CCP §177.5 may not be imposed except on notice contained in a party's moving or responding papers, or on a judge's own motion after notice and opportunity to be heard. Adequacy of notice is determined on a case-by-case basis. *Seykora v Superior Court* (1991) 232 CA3d 1075, 1081, 283 CR 857. A full evidentiary hearing in which witnesses are called is not required; the scope of the hearing is within the judge's discretion. 232 CA3d at 1082.

An order imposing sanctions must be in writing and must recite in detail the conduct or circumstances justifying the order. CCP §177.5; *Caldwell v Samuels Jewelers* (1990) 222 CA3d 970, 977, 272 CR 126

(simply stating that there is "good cause appearing" to impose sanctions is insufficient).

These requirements with respect to notice, an opportunity to be heard, and the order are essentially the same as the provisions governing sanctions payable to a party under CCP §128.5. For discussion of these requirements, see §§3.63–3.71.

2. Expenses Under CCP §396b(b) in Challenging Attorney's Selection of Venue

a. [§3.83] Court's Authority To Award

A judge has discretion to order payment to the prevailing party of reasonable expenses and attorneys' fees incurred in making or resisting a motion to transfer a case, regardless of that party's entitlement to recover costs of the action. CCP §396b(b). See *Mission Imports, Inc. v Superior Court* (1982) 31 C3d 921, 932, 184 CR 296 (award of expenses and fees upheld; motion clearly lacked legal foundation in case that was brought in one of several counties where venue was proper). As between a party and the party's attorney, expenses and fees are the personal liability of the attorney and not chargeable to the party (CCP §396b(b)), because the attorney is expected to know the venue rules when selecting the venue for an action or moving to have the venue transferred (see *Metzger v Silverman* (1976) 62 CA3d Supp 30, 39, 133 CR 355).

b. [§3.84] Factors in Awarding; Procedure

A judge must consider the following factors in awarding sanctions under CCP §396b(b): (1) whether an offer to stipulate to a change of venue was reasonably made and rejected, and (2) whether the motion or selection of venue was made in good faith given the facts and law the party making the motion or selecting the venue knew or should have known. CCP §396b(b); *Metzger v Silverman* (1976) 62 CA3d Supp 30, 40, 133 CR 355 (because of attorney-client privilege, court's primary concern will be nature of facts adduced at hearing on motion and counsel's supporting legal argument).

Sanctions may not be imposed except on notice in a party's moving papers, or on a judge's own noticed motion, and after an opportunity to be heard. CCP §396b(b). These notice provisions are very similar to the requirement of CCP §128.5(c), which states that sanctions may not be imposed except on notice in a party's papers, or on the judge's own motion, after notice and opportunity to be heard. Therefore, cases construing the notice and hearing requirements under CCP §128.5 should be relevant in interpreting CCP §396b(b). For discussion of notice and hearing requirements under CCP §128.5, see §§3.63–3.67. See also CCP §437c(j), discussed in §3.87, and CCP §1038, discussed in §§3.85–3.86.

Although CCP §396b(b) does not specify order requirements, the judge should include the factual basis for his or her conclusion, as in sanctions orders under CCP §128.5. For discussion of a CCP §128.5 sanctions order, see §§3.68–3.71. For a checklist of CCP §396b(b) procedure, see §3.15.

In addition, a judge may impose sanctions under CCP §128.5 against a plaintiff's attorney who fails to stipulate to a change of venue after being informed of the court's venue rules and for other improper conduct in the litigation. See *Andrus v Estrada* (1995) 39 CA4th 1030, 1042–1043, 46 CR2d 300.

The plaintiff must pay any attorneys' fees and expenses awarded to the defendant under CCP §396b(b) before transfer of the action. CCP §399; *Moore v Powell* (1977) 70 CA3d 583, 590, 138 CR 914.

3. Defense Costs Under CCP §1038 in Bad-Faith Tort Claim Proceeding

a. [§3.85] When Available; Effect of Request

A judge may award defense costs, including reasonable attorneys' fees, on the motion of a defendant or cross-defendant under certain conditions in any civil proceeding under the California Tort Claims Act (Govt C §§815–818.9) or in any action for express or implied indemnity or for contribution. See CCP §1038(a). The costs are available only when the defendant or cross-defendant is granted relief in a motion for summary judgment, judgment under CCP §631.8, directed verdict, or nonsuit. CCP §1038(d). The defense motion must be made before discharge of the jury or entry of judgment. CCP §1038(c). The purpose of CCP §1038 is to discourage frivolous lawsuits by allowing blameless public entities and other defendants to recover their defense costs. *Hall v Regents of the Univ. of Cal.* (1996) 43 CA4th 1580, 1587, 51 CR2d 387.

Any party requesting relief under CCP §1038 waives any right to seek damages for malicious prosecution. Failure to make the motion, however, does not waive the right to sue for malicious prosecution. CCP §1038(c).

b. [§3.86] Procedure

Defendant's motion. An award of defense costs under CCP §1038 may not be made except on notice contained in a party's papers and after affording the parties an opportunity to be heard. The notice and hearing provisions are very similar to the requirements of CCP §128.5, which authorize a judge to impose monetary sanctions for bad-faith actions or tactics. Decisions construing the notice and hearing requirements of CCP §128.5 are presumably relevant to the interpretation of CCP §1038 due process requirements. For discussion of CCP §128.5, see §§3.63–3.67.

No motion by judge. In contrast to CCP §128.5 sanctions, however, a judge may not impose defense costs under CCP §1038 on the judge's own motion.

Determination of defense motion. On a defense motion, the judge must determine, at the time of granting the dispositive relief, whether the plaintiff, petitioner, cross-complainant, or intervenor against whom the motion is made brought the proceeding with reasonable cause *and* in the good-faith belief that there was a justifiable controversy under the facts and law that warranted the filing of the proceeding. CCP §1038(a); *Hall v Regents of the Univ. of Cal.* (1996) 43 CA4th 1580, 1585, 51 CR2d 387. The moving defendant must negate either the plaintiff's good faith or reasonable cause in order to prevail. *Kobzoff v Los Angeles County Harbor/UCLA Med. Ctr.* (1998) 19 C4th 851, 860–863, 80 CR2d 803. See *Salazar v Upland Police Dep't* (2004) 116 CA4th 934, 949, 11 CR3d 22 (although both reasonable cause and good faith must exist to bring action, absence of either condition is sufficient grounds for awarding fees under CCP §1038). Before denying a defendant's CCP §1038 motion, a judge must find that the plaintiff brought the action with a good faith belief in its justifiability and with objective reasonable cause. *Kobzoff v Los Angeles County Harbor/UCLA Med. Ctr., supra,* 19 C4th at 862.

A defendant in whose favor summary judgment is granted in an action under the Tort Claims Act (Govt C §§910–935.7) is entitled to an award of attorney's fees and costs under CCP §1038 if the plaintiff lacked either reasonable cause or a good faith belief that the action was justified. The defendant's motion for fees and costs must be filed at the earliest practical time before entry of judgment and must be heard by the same judge that heard the summary judgment motion unless that judge is unavailable. *Gamble v Los Angeles Dep't of Water & Power* (2002) 97 CA4th 253, 259, 118 CR2d 271.

What constitutes good faith. "Good faith" or its absence involves a factual inquiry into the plaintiff's subjective state of mind, *i.e.,* did the plaintiff believe the action was valid and what was the plaintiff's intent in pursuing it? Good faith is linked to a belief in a "justifiable controversy under the facts and law." *Hall v Regents of the Univ. of Cal., supra,* 43 CA4th at 1586. The judge must determine "reasonable cause" objectively on the basis of the facts known to the plaintiff when the action was filed; the judge must decide whether any reasonable attorney would have thought the claim to be tenable. 43 CA4th at 1586. A plaintiff cannot meet the reasonable cause requirement merely by showing that he or she had no information one way or the other about the existence of an element of the cause of action. *Knight v City of Capitola* (1992) 4 CA4th 918, 933, 6 CR2d 874. Nor does a party meet the reasonable cause requirement by showing that it had a legitimate tactical reason for keeping the defendant in the lawsuit after testimony has established that the defendant did not

breach the standard of care. *Hall v Regents of the Univ. of Cal., supra,* 43 CA4th at 1586.

At a minimum, reasonable cause requires that the plaintiff's counsel have some articulable facts to conclude that a particular person or entity should be sued as a defendant. *Carroll v State of California* (1990) 217 CA3d 134, 142, 265 CR 753.

"Brought," as used in CCP §1038(a), encompasses not only the filing but also the continued maintenance of an action. See *Hall v Regents of the Univ. of Cal., supra,* 43 CA4th at 1586; *Curtis v County of Los Angeles* (1985) 172 CA3d 1243, 1252, 218 CR 772. See *Salazar v Upland Police Dep't, supra,* 116 CA4th at 950–951 (sufficient evidence of lack of reasonable cause and good faith for continuing plaintiff's lawsuit against defendant police department after she stipulated there was good cause to arrest her).

Determination of defense costs. If the judge determines that the proceeding was not brought in good faith and with reasonable cause, the judge must decide the additional issue of what costs the defendant or cross-defendant reasonably and necessarily incurred in defending the action. CCP §1038(a). "Defense costs" include reasonable attorneys' fees, expert witness fees, and the expense of the services of experts, advisers, and consultants when reasonably incurred in defending the proceeding. See CCP §1038(b). The costs recoverable under CCP §1038(b) are broader than the costs that are recoverable under CCP §1032, the general costs statute. See *Crib Retaining Walls, Inc. v NBS/Lowry, Inc.* (1996) 47 CA4th 886, 891, 54 CR2d 850. However, dismissed defendants or cross-defendants often seek costs under the narrower CCP §1032 because they will not need to obtain prior court approval or findings that the complaint or cross-complaint was brought in good faith and with reasonable cause. See 47 CA4th at 891 (such defendants or cross-defendants are entitled to costs as matter of right).

For a checklist of CCP §1038 procedure, see §3.16.

4. [§3.87] Expenses Under CCP §437c(j) for Bad-Faith Summary Judgment Affidavits

If a judge determines at any time that any of the affidavits or declarations in support of or in opposition to a motion for summary judgment or summary adjudication were presented in bad faith or solely for purposes of delay, the judge must order the party presenting the affidavits or declarations to pay to the other party the amount of reasonable expenses that party incurred as a result of the filing. See CCP §437c(j). This sanctions provision does not authorize an award of attorney's fees. It only allows recovery of expenses such as expert witness fees and service fees. *Collins v State Dep't of Transp.* (2003) 114 CA4th 859, 870, 8 CR3d 132.

Sanctions may not be imposed under CCP §437c(j) except on notice in a party's papers, or on the judge's own noticed motion, and after affording an opportunity to be heard. CCP §437c(j). This notice provision is very similar to the requirements of CCP §128.5 and to notice and hearing provisions added to other sanctions provisions, effective on the same date. See CCP §§396b(b), 1038 (however, CCP §1038 does not permit sanctions on the judge's own motion). Thus, decisions interpreting the CCP §128.5 due process requirements should be relevant to construing the provisions of CCP §437c(j). For discussion of CCP §128.5 notice and hearing requirements, see §§3.63–3.67. For a checklist of the CCP §437c(j) procedure, see §3.17.

Apparently, the same guidelines for determining bad-faith actions or tactics under CCP §128.5 apply when sanctions are sought under CCP §437c(j) in summary judgment proceedings. At least one appellate court has recognized CCP §437c(j) as a specific application of CCP §128.5 in summary judgment proceedings. See *Winick Corp. v County Sanitation Dist. No. 2* (1986) 185 CA3d 1170, 1176, 230 CR 289. For discussion of conduct warranting and not warranting sanctions under CCP §128.5, see §§3.10–3.11.

Denial of a party's summary judgment motion does not preclude a subsequent award of sanctions against the opposing party under CCP §128.5 when the party prevails in a subsequent trial of the action. See *Harris v Rudin, Richman & Appel* (2002) 95 CA4th 1332, 1342–1344, 116 CR2d 552 (defendant filed motions for reconsideration, to vacate judgment, and for new trial that only repeated arguments judge had rejected in granting plaintiff summary judgment); *Bond v Pulsar Video Prods.* (1996) 50 CA4th 918, 923, 57 CR2d 917 (judge properly awarded sanctions on finding that plaintiff's claim was frivolous, without foundation, and in bad faith; declarations sufficient to create triable issue of fact on summary judgment motion were revealed to be spurious at trial).

A judge may award monetary sanctions under CCP §2033.420 to reimburse a defendant who prevails on its summary judgment motion for expenses incurred because the plaintiff failed to admit specified facts in requests for admissions propounded by the defendant when the defendant later proves these facts on the summary judgment motion. *Barnett v Penske Truck Leasing Co.* (2001) 90 CA4th 494, 495, 498–499, 108 CR2d 821.

5. Sanctions Sought Under Delay Reduction Rules

a. [§3.88] Court's Authority To Award

Judges who are assigned cases under the Trial Court Delay Reduction Act (Govt C §§68600–68620) have all the powers to impose sanctions that are authorized by law and are encouraged to impose sanctions in order to

achieve delay reduction. Govt C §68608(b). See also Govt C §§68605.5, 68608(a) (delay reduction automatically applies to actions and proceedings in superior courts except for cases assigned to juvenile, domestic relations, or probate courts, or to a judge for all purposes based on subject matter). Under the Act, judges have the power to dismiss actions or strike pleadings if it appears that less severe sanctions would be ineffective, after taking into account the effect of previously imposed sanctions or earlier failure to comply. Govt C §68608(b).

b. [§3.89] Procedure

There is no particular procedure for imposing sanctions under "fast-track" local rules. However, these types of sanctions are subject to the same due process constraints as any other type of sanctions, *i.e.*, a judge may impose sanctions only after giving the party notice and an opportunity to be heard. See *Reid v Balter* (1993) 14 CA4th 1186, 1193–1194, 18 CR2d 287 (order dismissing plaintiffs' action for failure to appear at status conference was void because plaintiffs were not given notice that action would be dismissed if they failed to appear).

☛ JUDICIAL TIP: There are no formal order requirements under Govt C §68608(b). However, when imposing any sanctions, the judge may want to follow step 7 of checklist §3.12 in issuing an order.

c. Delay Reduction Rules and CCP §575.2

(1) [§3.90] Types of Sanctions That May Be Imposed

Local rules adopted under CCP §575.1 may authorize a variety of sanctions against parties or attorneys who disobey them. These may include monetary sanctions, the striking of pleadings or parts of pleadings, the dismissal of the action or parts of the action, the entry of judgment by default, or penalties of a lesser nature. CCP §575.2(a).

A judge must give a party prior notice and an opportunity to be heard before imposing sanctions under CCP §575.2(a) for the party's failure to comply with the court's local rules. CCP §575.2(a).

For example, a judge may impose monetary sanctions against a plaintiff's attorney for violating the court's local rule governing participation in judicial arbitration proceedings, based on the attorney's failure to have the plaintiff appear at the arbitration hearing or to be available by telephone, and on the attorney's failure to produce any evidence at the hearing in support of the plaintiff's claims. *Rietveld v Rosebud Storage Partners, L.P.* (2004) 121 CA4th 250, 254–257, 16 CR3d 791.

A court's power to impose sanctions on participants in proceedings before it for violation of the court's local rules is not affected by the filing

of a bankruptcy proceeding by one of those participants. *Keitel v Heubel* (2002) 103 CA4th 324, 334–336, 126 CR2d 763 (automatic stay does not preclude court from imposing sanctions on party or attorney for violating court rules).

An appellate court reviewing sanctions imposed under CCP §575.2 considers not only whether there was a violation of the local rule but also whether that rule conflicts with state law. See *Rietveld v Rosebud Storage Partners, L.P., supra,* 121 CA4th at 257 (sanctions upheld).

(2) [§3.91] When Sanctions Should Be Imposed on Attorney, Not Party

Code of Civil Procedure §575.2(b) forbids the use of sanctions to adversely affect a party's case when noncompliance with local rules is attributable solely to counsel. See *Estate of Meeker* (1993) 13 CA4th 1099, 1104, 16 CR2d 825 (failure to file joint trial statement). Before imposing sanctions that adversely affect a party's cause of action or defense, a judge must hold a fact-finding hearing to determine culpability. See *State ex rel Public Works Bd. v Bragg* (1986) 183 CA3d 1018, 228 CR 576.

Section 575.2(b) conflicted with Govt C §68608(b), which authorizes judges to dismiss cases as a sanction for refusal to follow local delay reduction rules when less severe sanctions would be ineffective. The California Supreme Court resolved this conflict in *Garcia v McCutchen* (1997) 16 C4th 469, 66 CR2d 319, in which it held that Govt C §68608(b) is subject to the limitations of CCP §575.2(b), and does not establish a separate sanctioning power. A judge is prohibited by CCP §575.2(b) from dismissing a plaintiff's action for the failure of the plaintiff's attorney to comply with local delay reduction rules. 16 C4th at 474–480.

For example, a judge may not dismiss a plaintiff's complaint for failure to meet a local delay reduction rule requiring service of the summons within 60 days of the filing of the complaint. In *Tliche v Van Quathem* (1998) 66 CA4th 1054, 1062, 78 CR2d 458, the judge failed to consider less drastic measures than dismissal as a first sanction and failed to take into account that service of process is ordinarily within the attorney's, not the client's, power. There was no evidence of prior sanctions against either the plaintiff or counsel, or any evidence that the plaintiff was responsible for the delay in service of the summons. The sanction for failure to accomplish service within the 60-day period should, in the first instance, have been assessed against the attorney in the form of monetary sanctions, not against the plaintiff by dismissing the case. 66 CA4th at 1061.

It was an abuse of discretion for a judge to dismiss a plaintiff's complaint as a sanction for the plaintiff's failure to appear at trial because the plaintiff was out of the country for medical treatment. *Link v Cater*

(1998) 60 CA4th 1315, 1322–1326, 71 CR2d 130. The plaintiff had complied with all court rules and prior orders, prosecuted the case diligently, and scheduled the medical treatment before receiving notice of the date to which the trial had been continued. A less severe sanction than termination, such as a monetary sanction, would have been appropriate. 60 CA4th at 1322–1326.

(3) [§3.92] Imposition of Sanctions Under Local Rule That Conflicts With Statute or Rule of Court

A judge abuses his or her discretion by using a violation of a local delay reduction rule to dismiss a case or force a more expeditious resolution after the parties conditionally settle the action and file a notice of settlement with the court in compliance with Cal Rules of Ct 225(c). *Interinsurance Exch. v Faura* (1996) 44 CA4th 839, 844, 52 CR2d 199. The state rule of court prevails over a local delay reduction rule. 44 CA4th at 843. Similarly, a local court rule that required counsel to meet and confer before filing most motions and that imposed sanctions for a failure to do so could not properly be applied to a party's motion for a new trial. Code of Civil Procedure §§656–662.5 specify detailed procedures for such a motion, and a party that complies with these procedures has a statutory right to have the motion considered. A judge has no authority to impose sanctions against a party who complies with these procedures but fails to comply with additional restrictions imposed by the court. *Pacific Trends Lamp & Lighting Prods., Inc. v J. White, Inc.* (1998) 65 CA4th 1131, 1134–1135, 76 CR2d 918.

(4) [§3.93] Requirements for Local Rules

The court may not dismiss an action based on the plaintiff's failure to comply with local delay reduction standards that have not been adopted as court rules. See *Simmons v City of Pasadena* (1995) 40 CA4th Supp 1, 5, 47 CR2d 102. In addition, a judge may not impose sanctions under a local court rule that sets lower procedural standards and affords less due process protection than CCP §128.5 or §128.7. See *Pacific Trends Lamp & Lighting Prods., Inc. v J. White, Inc.* (1998) 65 CA4th 1131, 1135–1136, 76 CR2d 918.

A judge had no authority to impose monetary sanctions on an attorney for violating a local court rule prohibiting ex parte communications on the substance of a pending case with a judge or the judge's clerk, when the attorney's communication was with a court clerk to set a date for a status conference without informing opposing counsel. *Blum v Republic Bank* (1999) 73 CA4th 245, 248–249, 86 CR2d 226.

(5) [§3.94] Sanctioning Pro Per Litigants

Because pro per litigants are entitled to the same, but no greater, rights than represented litigants and are presumed to know delay reduction rules, they may be sanctioned for failure to comply with delay reduction rules or court orders under CCP §575.2, Cal Rules of Ct 227, and local rules (see, *e.g.*, Los Angeles Super Ct Rules 7.9, 7.13). These sanctions may include terminating sanctions, such as the striking of pleadings. *Wantuch v Davis* (1995) 32 CA4th 786, 795, 39 CR2d 47. However, a judge may not order terminating sanctions as a first response when noncompliance is through no fault of the party. 32 CA4th at 795 (failure to appear resulted from party's imprisonment).

6. Sanctions Sought in Family Law Proceedings

a. Sanctions Under Fam C §3027.1 for False Accusation of Child Abuse or Neglect

(1) [§3.95] Court's Authority To Award

If a judge determines, based on an investigation conducted under Fam C §3027 or other evidence presented, that an accusation of child abuse or neglect made during a child custody proceeding was false and the accuser knew it to be false, the judge may impose both reasonable sanctions not to exceed costs incurred in defending against the accusation and reasonable attorneys' fees expended in recovering the sanctions against the accuser. This remedy is in addition to any other remedy provided by law. Fam C §3027.1(a), (c).

(2) [§3.96] Procedure

On motion by the person requesting sanctions under Fam C §3027.1, the judge must issue an order to show cause (OSC) why the sanctions should not be granted. Fam C §3027.1(b). The OSC must be served on the person against whom sanctions are sought, and a hearing on the OSC must be scheduled to be conducted at least 15 days after the order is served. Fam C §3027.1(b). The "person" requesting sanctions or against whom sanctions are sought includes a party, a party's attorney, or a witness. Fam C §3027.1(a). See §3.18.

A request for sanctions under Fam C §3027.1 does not require a finding of falsity during the underlying temporary custody proceeding. *Marriage of Dupre* (2005) 127 CA4th 1517, 1525–1527, 26 CR3d 328. The statute requires that the false statement be made during the child custody proceeding but does not require the falsity to be established during that proceeding. To require falsity to be established before issuing an OSC would render the OSC superfluous. 127 CA4th at 1527.

An order dismissing a party's request for sanctions is appealable under CCP §904.1(a)(2). 127 CA4th at 1523–1525.

b. Sanctions Under Fam C §271 for Frustrating Settlement of Family Law Cases

(1) [§3.97] Court's Authority To Award

A judge may base an award of attorneys' fees and costs (in the nature of a sanction) on the extent to which each party's or attorney's conduct either promotes or thwarts the general policy of reaching settlements and reducing litigation costs. Fam C §271(a); *Marriage of Freeman* (2005) 132 CA4th 1, 5, 33 CR3d 237 (note: petition for review has been filed in *Freeman*); *Marriage of Petropoulos* (2001) 91 CA4th 161, 177, 110 CR2d 111. See *Marriage of Mason* (1996) 46 CA4th 1025, 1028, 54 CR2d 263 (sanctions awarded for filing frivolous appeal of parties' settlement).

Family Code §271 does not require that the conduct be frivolous or taken solely for the purpose of delay; such conduct, however, may be sanctioned under this section. *Marriage of Freeman, supra*, 132 CA4th at 6. It contemplates that the judge will impose any sanctions at the end of the litigation, when the extent and severity of the party's bad conduct can be judged. 132 CA4th at 6.

Merely refusing to compromise will not warrant sanctions. *Marriage of Aninger* (1990) 220 CA3d 230, 245, 269 CR 388 (failure of husband's counsel to respond to two letters inviting settlement discussions on support modification and refusal to compromise on support and property division issues were not so blameworthy to warrant sanctions under former CC §4370.6, now Fam C §271). However, sanctions in the form of attorneys' fees have been found to be warranted under former CC §4370.5 in the following cases:

- Wife brought several claims against husband in order to harass him during lengthy and protracted dissolution proceedings. *Marriage of Norton* (1988) 206 CA3d 53, 59, 253 CR 354.
- Husband (who was own attorney) submitted an incomprehensible brief, filed most of the 12 appeals in this case, and delayed in paying portions of the judgment. *Marriage of Green* (1989) 213 CA3d 14, 29, 261 CR 294.
- Husband's conduct manifested "a deliberate attempt to exhaust [wife] financially and emotionally and deny her effective counsel" (husband had sued wife's attorney for malicious prosecution and had brought many different family law proceedings). *Marriage of Green* (1992) 6 CA4th 584, 589, 7 CR2d 872 (same parties as above).

A judge properly imposed attorney's fees as sanctions against a former wife, making payment contingent on her failure to pay her share of federal income taxes in accordance with the terms of the dissolution judgment. The wife and her attorneys had engaged in a series of stratagems to avoid the consequence of their initial failure to contest the

50–50 division of tax liabilities and their agreement to file a joint return. *Marriage of Hargrave* (1995) 36 CA4th 1313, 1323, 43 CR2d 474.

In a dissolution proceeding to resolve competing claims of the first and second wives of a deceased man to his retirement benefits, the judge properly imposed additional sanctions under Fam C §271 in favor of the second wife when the judge denied the first wife's motion for reconsideration of a prior sanctions order imposed against her for her failure to appear at the hearing. *Marriage of Burgard* (1999) 72 CA4th 74, 82, 84 CR2d 739. The judge did not abuse his discretion in imposing additional sanctions, because the first wife's prior conduct had resulted in an earlier sanctions award and her motion for reconsideration did not present any new or different facts. The second wife was obligated to respond to an unnecessary motion.

Although the family court has power to impose sanctions on a party whose misrepresentations required litigation to undo any agreement or judgment, that power is limited to awarding attorneys' fees and costs under Fam C §271(a). The court has no power to award punitive damages. *Dale v Dale* (1998) 66 CA4th 1172, 1186, 78 CR2d 513.

(2) [§3.98] Procedure

An award of fees and costs as a sanction may not be imposed without notice to the party who may be sanctioned and an opportunity for that party to be heard. Fam C §271(b); *Marriage of Petropoulos* (2001) 91 CA4th 161, 178, 110 CR2d 111 (record indicated wife was well aware she was subject to sanctions even if trial court did not expressly say so).

The statute does not specify the nature of the hearing that is contemplated. Although an opportunity to be heard must be given, it does not necessarily mean that an oral hearing is required. 91 CA4th at 178–179.

In awarding sanctions under Fam C §271, the judge must consider all evidence concerning the parties' incomes, assets, and liabilities. Fam C §271(a). See §3.19. While the judge may impose sanctions under this section in the absence of a demonstration of financial need by the requesting party, the judge may not impose an unreasonable financial burden on the sanctioned party. Fam C §271(a); *Marriage of Hublou* (1991) 231 CA3d 956, 964, 282 CR 695.

An award of fees and costs as sanctions under Fam C §271 is payable only from the property or income of the sanctioned party or that party's share of the community property. Fam C §271(c).

c. [§3.99] Other Sanctions in Family Law Proceedings

If the judge finds that the income and expense declaration filed by the party responding to a motion to modify or terminate a support order is incomplete, inaccurate, or not submitted in good faith, or if the party has

not attached the previous year's tax returns, the judge may order sanctions for payment of costs of the motion, including costs of depositions and subpoenas. Fam C §3667. Sanctions may also be imposed under CCP §128.5 in family law proceedings. See, *e.g.*, *Marriage of Quinlan* (1989) 209 CA3d 1417, 257 CR 850; *Marriage of Gumabao* (1984) 150 CA3d 572, 198 CR 90. Many judges also impose sanctions under CCP §177.5, Cal Rules of Ct 227, or under local rules in family law cases.

7. [§3.100] Sanctions Under Cal Rules of Ct 227 for Violation of Judicial Council Rules

A judge may order a person who fails to comply with a Judicial Council rule to pay reasonable monetary sanctions to the court or an aggrieved person, or both, unless good cause is shown. Cal Rules of Ct 227(a), (b). See Cal Rules of Ct 201.8(c) (judge may impose sanctions under Cal Rules of Ct 227 against party and/or party's attorney for failing to file cover sheet with first paper being filed). For purposes of this rule, the term "person" means a party, a party's attorney, or a witness, and an insurer or any other individual or entity whose consent is necessary for resolution of the case. Cal Rules of Ct 227(b).

Sanctions may not be imposed except on notice in a party's motion papers or on the court's own motion after the court has provided notice and an opportunity to be heard. Cal Rules of Ct 227(c). A party's motion must set forth the rule that has been violated, describe the specific conduct that is alleged to have violated the rule, and identify the attorney, law firm, party, or witness against whom sanctions are sought. Cal Rules of Ct 227(c). The court on its own motion may issue an order to show cause that sets forth the rule that has been violated, describes the particular conduct that appears to have violated the rule, and directs the attorney, law firm, party, or witness to show cause why sanctions should not be imposed for violation of the rule. Cal Rules of Ct 227(c). Before sanctions may be imposed, due process requires that a hearing must be held to determine whether an offense was committed; it is not sufficient to hold a hearing solely on the issue of the amount of the sanctions. See *Bergman v Rifkind & Sterling, Inc.* (1991) 227 CA3d 1380, 1387, 278 CR 583.

The sanctions order must be in writing and must specify the conduct or circumstances justifying the imposition of sanctions. Cal Rules of Ct 227(e); *Caldwell v Samuels Jewelers* (1990) 222 CA3d 970, 978, 272 CR 126. If the failure to comply with an applicable rule was the responsibility of the attorney, not the party, sanctions may only be imposed on the attorney and may not adversely affect the party's cause of action or defense. Cal Rules of Ct 227(b). In addition to ordering the sanctioned party to pay reasonable monetary sanctions to the court and/or an aggrieved party, the court may order the sanctioned party to pay to the aggrieved party that party's reasonable expenses, including reasonable

attorney's fees and costs, incurred in connection with the sanctions motion or order to show cause. Cal Rules of Ct 227(d).

An order imposing a monetary sanction payable to a party has the effect of a money judgment. See *Newland v Superior Court* (1995) 40 CA4th 608, 615, 47 CR2d 24. Unless there is a stay of the sanction, the order is directly enforceable through issuance of a writ of execution. See *Newland v Superior Court*, *supra*. A court order imposing sanctions against a party for failing to comply with the court's local rules is not directly appealable under CCP §904.2(a). *Lim v Silverton* (1997) 61 CA4th Supp 1, 3–4, 72 CR2d 408.

8. Sanctions Under CCP §473(c)

a. [§3.101] Monetary Penalty

A judge who grants relief under CCP §473(b) from a default, a default judgment, or a dismissal resulting from attorney mistake, inadvertence, surprise, or neglect, may impose a penalty against the offending attorney of up to $1000. CCP §473(c)(1)(A). If the client is at fault, the judge may impose the penalty against the client. CCP §473(c)(1)(A). Judges are most likely to impose a penalty in a case of positive misconduct by the attorney or when the attorney has not been candid with the court in the moving papers and supporting affidavit.

The statute does not specify to whom the penalty is to be paid. Judges have made orders requiring payment to the court as well as to the opposing party, *e.g.*, when the court has incurred significant expenses for hearings missed by the offending attorney.

b. [§3.102] Notice to State Bar

If the sanctions imposed against an attorney total $1000 or more, the judge must notify the State Bar. Bus & P C §6086.7(c). The court may also order the offending attorney to pay up to $1000 to the State Bar Client Fund. CCP §473(c)(1)(B). A judge might impose such a penalty if the attorney's conduct has been particularly egregious, *e.g.*, if this conduct amounts to an abandonment of the client or a breach of the fiduciary duty owed to the client.

c. [§3.103] Granting Other Appropriate Relief

The judge may also grant other appropriate relief. CCP §473(c)(1)(C). A judge might issue an "issue preclusion" or "fact preclusion" order in an appropriate case. If evidence was lost or destroyed during the delay, the judge might require the parties to stipulate what this evidence would have shown. The judge might require the parties to comply with an expedited discovery schedule and might set an early trial date for the case.

The imposition of these sanctions is a form of punishment and is to be distinguished from the judge's authority under CCP §473(b) to impose conditions on the granting of relief from default. *Kodiak Films, Inc. v Jensen* (1991) 230 CA3d 1260, 1264, 281 CR 728.

In appropriate cases, a judge has the authority to impose sanctions under CCP §128.5 or §128.7 in connection with a motion for relief from default. See *Taylor v Varga* (1995) 37 CA4th 750, 761–762, 43 CR2d 904 (upholding CCP §128.5 sanctions order against cross-defendants and their attorneys based on their frivolous and bad-faith tactics in filing duplicative motions seeking relief from default on cross-complaint).

d. [§3.104] Statement of Reasons for Imposing Sanctions

A judge must provide a written statement of the reasons for imposing monetary sanctions (whether under CCP §128.5, §128.7, or §473) against a defendant as a condition of granting relief from default. *Hearst v Ferrante* (1987) 189 CA3d 201, 204, 234 CR 385. When a judge conditions relief on the defendant's payment of sanctions, the default or default judgment remains in effect until the sanctions are paid. *Howard v Thrifty Drug & Discount Stores* (1995) 10 C4th 424, 439 n5, 41 CR2d 362.

e. [§3.105] Payment of Opposing Party's Attorneys' Fees and Costs

If the judge grants the motion based on an attorney's affidavit of fault, the judge must direct the attorney to pay reasonable compensatory legal fees and costs to the opposing party or the opposing party's attorney. CCP §473(b); *Avila v Chua* (1997) 57 CA4th 860, 869, 67 CR2d 373 (dismissal case); *Metropolitan Serv. Corp. v Casa de Palms, Ltd.* (1995) 31 CA4th 1481, 1488, 37 CR2d 575 (default case). When the motion is not based on an attorney's affidavit of fault, a judge has the discretion to order the offending party to pay the opposing party's reasonable attorneys' fees and costs. See *Daley v County of Butte* (1964) 227 CA2d 380, 395–396, 38 CR 693 (judge may afford relief "upon any terms as may be just").

f. [§3.106] Attorney's Failure To Comply With Sanctions Order

A judge's order granting relief on the basis of an attorney's affidavit of fault may not be made conditional on the attorney's payment of any fees, costs, or other monetary penalties imposed by the judge, or on compliance with other sanctions ordered by the judge. CCP §473(c)(2). If the attorney fails to comply with the judge's order to pay fees, costs, or other monetary penalties, the judge may impose sanctions under CCP §177.5 or Cal Rules of Ct 227 for failure to comply with the order or may hold the attorney in contempt under CCP §1209(a)(5).

9. [§3.107] Sanctions Under Court's Inherent Power

A judge generally may not require a party whose conduct is being sanctioned to pay the other party's attorney's fees unless an award of attorney's fees is expressly authorized by the statute that makes the conduct sanctionable. *Bauguess v Paine* (1978) 22 C3d 626, 634–637, 150 CR 461. The following statutes specifically authorize an award of attorney's fees as sanctions: CCP §§128.5 (for cases filed on or before December 31, 1994), 128.7 (for cases filed on or after January 1, 1995), 575.2 (for a violation of local court rules), 2023.030(a) (for a discovery violation). See also Cal Rules of Ct 227(d) (authorizing award of attorney's fees incurred in connection with motion or order to show cause based on opponent's failure to comply with Judicial Council rule); *Bryan v Bank of Am.* (2001) 86 CA4th 185, 192–199, 103 CR2d 148 (appellate court has inherent authority under Cal Rules of Ct 27(e)(1) to impose attorney's fees as sanctions for factual misrepresentations to court and violations of court rules); *Dana Commercial Credit Corp. v Ferns & Ferns* (2001) 90 CA4th 142, 146–147, 108 CR2d 278 (appellate court has inherent authority to impose sanctions for filing of frivolous motion on appeal).

A judge may, in the exercise of inherent equitable powers granted by CCP §128(a)(4) and (5), award attorney's fees without statutory authorization, but only in *very* limited circumstances, *e.g.*, in favor of a person who preserves a common fund or who acts as a private attorney general to further an important public policy. *Bauguess v Paine, supra,* 22 C3d at 636. Awarding attorney's fees as sanctions, without statutory authorization, undermines the adversary system. If the objective is to punish misconduct, there is ample power to punish the offender for contempt. 22 C3d at 638; see *Trans-Action Commercial Investors, Ltd. v Firmaterr, Inc.* (1997) 60 CA4th 352, 371–372, 70 CR2d 449 (judge may not impose attorney's fees as sanction for violation of court rule unless such award is authorized by statute; judge could have held attorney in contempt for repeated violations of judge's orders).

Similarly, a judge does not have inherent authority under CCP §128(a)(4) and (5) to order a party or an attorney, as a sanction, to pay a fee or cost that is not authorized by statute. See *Andrews v Superior Court* (2000) 82 CA4th 779, 781–783, 98 CR2d 426 (judge lacked inherent authority to require plaintiff's attorney to pay plaintiff's share of discovery referee's fee as a sanction; judge might have had statutory authority to impose such a sanction under former CCP §§2023 and 2031, now CCP §§2023.010–2023.040, 2031.300–3031.320).

V. SAMPLE FORMS

A. [§3.108] Written Form: Order To Show Cause in re Contempt

[*Title of court*]

[*Title of case*] NO._____

ORDER TO SHOW CAUSE
IN RE CONTEMPT

To: _____

YOU ARE HEREBY ORDERED to appear before the above-entitled court in Department ____, located at _____, _____, California, on [*date*], at _____ .m., to show cause, if any, why you should not be adjudged guilty of contempt of court, and punished accordingly, for the acts of willful disobedience of the order of the above-entitled court, as provided in section 1209(a)(5) of the California Code of Civil Procedure, and as more fully described in the attached [*declaration/affidavit/statement*] of _____. The declaration is attached and by this reference incorporated as though fully set forth, and a copy of the declaration shall be served on you with a copy of this order.

Dated: _____

_____
Judge of the Superior Court

B. [§3.109] Written Form: Statement of Facts of Commissioner or Referee

[*Title of court*]

[*Title of case*] NO._____

STATEMENT OF FACTS IN RE
CONTEMPT OF _____

I, _____, state as follows:

1. I am [*specify judicial office, e.g., Commissioner*] of the Superior Court, _____ County, California.

[*Alternative 1, for direct or hybrid contempt*]

2. On [*date*], in the case of _____, Case No._____, [*while serving as temporary judge on stipulation of the parties under Article VI, section 21 of the California Constitution*,] in the immediate view

and presence of the court, the alleged contemner [*did/said*] the following: [*Describe in detail the conduct or words constituting contempt*].

3. On [*date*], before committing the conduct described in Paragraph 2, the alleged contemner was warned that the conduct, if continued, would constitute contempt. Despite this warning, the alleged contemner continued the conduct warned against, as follows: [*Describe conduct*].

4. Contemner was cited for contempt on [*date*], for the conduct described above.

[*Alternative 2, for indirect contempt*]

2. On [*date*], in the case of _____, Case No._____, [*while serving as temporary judge on stipulation of the parties under Article VI, section 21 of the California Constitution,*] I gave the following order or direction to contemner, who was told that violation of that order or direction would be contempt of court: [*Set forth order given*].

A copy of the order was entered in the record of this court and served on contemner on [*date*].

3. On [*date*], contemner willfully and contemptuously failed to perform the order or direction, as follows: [*Describe willful and contemptuous failure*].

Contemner was cited for contempt for this failure on [*date*].

4. Contemner had the power to perform the order or direction at the time it was given on [*date*], and contemner continues to have the power to perform the order or direction.

[*Continue for all contempt*]

5. Because of the willful and contemptuous act described in this statement, contemner should be adjudged guilty of contempt and sentenced appropriately under the provisions of sections 1211–1222 of the Code of Civil Procedure.

Dated:_____

_____
Commissioner of the Superior Court

C. [§3.110] Written Form: Order and Judgment of Contempt

[*Title of court*]

[*Title of case*] NO. _____

ORDER AND JUDGMENT OF CONTEMPT

[*Alternative 1, for direct or hybrid contempt*]

1. On [*date*], at _____, in the immediate view and presence of the court, contemner [*did/said*] the following: [*Describe in detail the conduct or words constituting contempt*]. On [*date*], contemner had been warned that the conduct described above, if continued, would constitute contempt, as follows: [*Describe warning*].

[*If transcript is available, add*]

The full transcript of that portion of the proceeding containing this occurrence is attached to and made a part of this order and judgment.

[*For hybrid contempt, add*]

Contemner was notified [*orally by the court on [date], by the issuance and service of an order to show cause*] that the conduct described above was contemptuous.

[*Alternative 2, for indirect contempt*]

1. In the course of proceedings in the case of _____, Case No. _____, the court gave the following order or direction to contemner, who was told that violation of the order or direction would become contempt of court on [*date*]: [*Describe in detail (or state language of) the order violated, including the court's jurisdiction to make it, or specify in detail the conduct warned against*].

[*If transcript is available, add*]

The full transcript of that portion of the proceeding containing this occurrence is attached to and made a part of this order and judgment.

Contemner willfully failed to comply with the court's order as follows: [*Describe violation in detail*].

[*Continue for all contempt*]

[*Alternative 1*]

2. The court heard and considered contemner's [*explanation/excuse/apology*] for the conduct and rejected it because [*specify reason for rejection*].

[*Alternative 2*]

2. The court offered the contemner an opportunity to present an explanation or excuse for the conduct and the contemner declined.

[*Continue*]

3. After due consideration, the court finds, beyond a reasonable doubt:

a. That the contemner is guilty of contempt of court in violation of section 1209(a) of the Code of Civil Procedure as follows:

[*Add applicable subsection(s)*]

Subsection (a) — Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of trial or other judicial proceeding.

[a*nd/or*]

Subsection (a)(2) — A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding.

[a*nd/or*]

Subsection (a)(5) — Disobedience of any lawful judgment, order, or process of the court.

[a*nd/or*]

Subsection (a)(8) — Any other unlawful interference with the process or proceedings of a court.

[*Specify any additional subsections violated*]

[*For indirect contempt for violation of an order, add*]

b. That contemner had knowledge of the order, was able to comply at the time of the order and continues to have such ability, and has willfully failed to comply with the order.

[*Continue for all contempt*]

[*Punishment for contemptuous act*]

c. That the contemner is sentenced to

[*Either*]

pay a fine of $_____ [*not to exceed $1000*]

[a*nd/or*]

spend _____ days [*not to exceed five*] in the County jail.

[*Or, if contempt is failure to perform act contemner can still perform*]

confinement in the County jail until contemner performs the following act, or until the conclusion of the underlying proceeding: [s*pecify act required*].

[*Continue*]

d. That execution of the sentence of the court is

[*Choose applicable clause*]

stayed to [*date*] at _____, in Department _____. Contemner is ordered to return at that time.

Note: If contemner is an attorney, or a sexual assault victim who refuses to testify, stay for at least three days. CCP §§128(b), 1209(c). See discussion in §3.38.

[*or*]

not stayed, and contemner is ordered to pay the fine [*and/or*] is remanded to custody forthwith.

[*Continue*]

e. That the clerk of the court is ordered immediately to file this order and enter the contempt on the docket of the court and to deliver to contemner a copy of this order.

Dated:_____

_____
Judge of the Superior Court

D. [§3.111] Script: Coercive Imprisonment of Witness for Direct Contempt

The following spoken form should be used to impose coercive imprisonment for direct contempt against a witness who refuses to answer questions. See CCP §1219. Essentially the form follows the direct contempt procedure for handling a contemptuous act that occurs in the court's immediate view and presence. See CCP §1211. For a direct contempt procedure checklist, see §3.7. For a sample contempt order, which is also required (see CCP §1211), see §3.110.

(1) *Make a preliminary finding of the witness's refusal to answer question(s):*

The court finds that [*a question/questions*] relevant to these proceedings [*has/have*] been asked of the witness and the witness refuses to answer the question[s].

(2) *Find that there is no privilege not to answer questions. In a misdemeanor proceeding, for example, state the following:*

The court finds that the witness has been granted immunity under section 1324.1 of the Penal Code and has no privilege against self-incrimination under the state or federal constitution, nor any other privilege under the Evidence Code.

(3) *Order the witness to answer:*

I hereby order you to answer the question[s]. Do you intend to comply with my order?

(4) *Warn the witness that continued refusal will result in imprisonment for contempt:*

I hereby warn you that if you refuse to answer the question[*s*], I will find you in contempt of court under the provisions of section 1211 of the Code of Civil Procedure. Under section 1219 of that code, I will remand you to the custody of the sheriff without bail and order that you remain in [*his/her*] custody until you are ready to answer questions posed to you in this matter.

Do you understand the consequences of your refusal to answer the question[s]?

With this understanding, do you still refuse to answer the questions[s]?

(5) *Find the witness in contempt:*

You leave me no choice. I find that you are in direct contempt of this court under the provisions of section 1211 of the Code of Civil Procedure

for willful refusal to answer [*a*] question[*s*] in the immediate view and presence of the court and at its direction. I have ordered you to answer. I find that your refusal to answer the question[*s*] is an omission to perform an act that is presently within your power to perform, under the provisions of section 1219 of the Code of Civil Procedure.

I hereby order you to be remanded to the custody of the sheriff without bail and to be imprisoned until you have performed the act I have ordered of you, namely, the answering of all relevant questions put to you in this case.

(6) *Continue the underlying proceedings and order the witness returned to court periodically to give him or her a chance to purge the contempt.*

(7) *Find that the witness has purged the contempt when he or she agrees to answer*:

I hereby find that the contemner has purged [*himself/herself*] of the contempt order, and the contempt order is discharged. The contemner is ordered released from custody.

☛ JUDICIAL TIP: The coercive punishment must end when the contemner no longer has the power to perform the act. For a witness who refuses to testify, this usually means the conclusion of the underlying proceeding. See CCP §1219; *McComb v Superior Court* (1977) 68 CA3d 89, 99, 137 CR 233. However, if there are additional reasons for requiring the testimony, the court may continue the imprisonment until the imprisonment ceases to serve a coercive purpose. Once the act becomes impossible to perform or the coercive purpose ceases, the incarceration becomes punitive and is subject to the five-day limitation in CCP §1218 for punitive confinement. See *In re Farr* (1974) 36 CA3d 577, 584, 111 CR 649. For discussion, see §3.28.

VI. [§3.112] ADDITIONAL REFERENCES

(1) Contempt

CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—BEFORE TRIAL §§17.80–17.121 (Cal CJER 1995).

CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—TRIAL §§11.2–11.39 (Cal CJER 1997).

Rothman, California Judicial Conduct Handbook §§4.00–4.39 (CJA 1999).

2 Witkin & Epstein, California Criminal Law, *Crimes Against Governmental Authority* §§29–30 (3d ed 2000).

5 Witkin & Epstein, California Criminal Law, *Criminal Trial* §§22–23 (3d ed 2000).

7 Witkin, California Procedure, *Trial* §§182–201 (4th ed 1997).

8 Witkin, California Procedure, *Enforcement of Judgment* §§331–355 (4th ed 1997).

(2) Sanctions

CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—BEFORE TRIAL §§17.2–17.79 (Cal CJER 1995).

CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—TRIAL §§11.40–11.78 (Cal CJER 1997).

CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—AFTER TRIAL §§7.5, 7.30 (Cal CJER 1998).

Rothman, California Judicial Conduct Handbook §§4.40–4.41 (CJA 1999).

7 Witkin, California Procedure, *Trial* §§223–253 (4th ed 1997).

Table of Statutes

CALIFORNIA

Table of Cases